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In The
Supreme Court of the United States
October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., J-E-S-P CO., INC.;
SHIELDS BUSINESS MACHINES, INC.; MICRO-
GRAPHIC SERVICES, INC.; MICRO MAINTENANCE,
INC.; ATLANTA GENERAL MICROFILM CO., INC.;
ROGER KATONA, d/b/a G. & S. ELECTRONICS;
AMTECH EQUIPMENT MAINTENANCE, INC.;
ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL
SERVICES, INC.; BOB INGLE, INC.; DATA PROX
EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.;
I.O.A. DATA CORP.; SEARLE ENTERPRISES, d/b/a
MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIP-
MENT & SERVICE, INC.; OMNI MICROGRAPHIC SER-
VICES, INC.; and CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
VOLUME II, PAGES 236-469

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Petition For Certiorari Filed December 20, 1990
Certiorari Granted June 17, 1991

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICES, INC.,)	
et al.,	)	No. C 87 1686 WWS
)	
Plaintiffs,	)	JOINT STATUS
	)	CONFERENCE
v.	)	STATEMENT
)	
EASTMAN KODAK	)	Date: September 11, 1987
COMPANY,	)	Time: 11:00 a.m.
)	
Defendant.)	
)	

Plaintiffs Image Technical Services, Inc., et al., and
defendant Eastman Kodak Company jointly submit this
Status Conference Statement in compliance with Local

Rule 235-3 and the Court's Order Setting Status Conference.

1. Jurisdiction and Service

The Court has subject matter jurisdiction over this action. However, defendant's pending motion for summary judgment requests that if the Court dismisses plaintiffs' federal antitrust claims, it decline to accept jurisdiction over pendant state claims. Kodak is within the personal jurisdiction of the Court and has been properly served. No other service is outstanding.

2. The Substance of the Action

Plaintiffs' Position: This action involves antitrust claims by 18 companies from 10 states around the United States, who are suing the Eastman Kodak Company as individual plaintiffs. The substance of the action centers around the policies, practices and acts of the Eastman Kodak Company with regard to the sales and servicing of photocopy and micrographics equipment. Plaintiffs are independent service organizations which service Kodak micrographics equipment, or reconditioners and/or brokers of such equipment. The principal policies, practices and acts complained of involve Kodak's preventing plaintiffs from obtaining parts for repair of Kodak photocopy and micrographics equipment; and, Kodak's restrictions on parts and service for machines not purchased directly from Kodak. Plaintiffs' causes of action in the complaint are:

1) Tying of parts to Kodak service and equipment, and of service to the equipment, under Sherman Act § 1 and Clayton Act § 3;

2) Monopolization of the parts and service market, and of the reconditioned and used Kodak micrographic and photocopy equipment markets under Section 2 of the Sherman Act;

3) Attempts to monopolize service, parts and resale of used Kodak photocopy and micrographics equipment under Section 2 of the Sherman Act;

4) Combinations, contracts and conspiracies in restraint of trade and combinations and conspiracies to monopolize in violation of the Sherman Act §§ 1 and 2 involving Kodak's policies, practices and acts to prevent OEM manufacturers from selling parts for Kodak photocopy and micrographics equipment to plaintiffs and to prevent plaintiffs from purchasing such parts from other entities to whom Kodak does sell such parts;

5) Related claims for breach of contract, fraud and violation of state antitrust and unfair competition laws based upon the facts which support the Federal antitrust claims above.

Defendant Kodak, as set out in its motion for summary judgment, defends on a number of grounds, including Kodak's right to unilaterally determine with whom it will deal and on what terms, disputes the definition of relevant markets and plaintiffs' "lock-in" theory, and denies that there is a factual basis for the claims of contracts, combinations and conspiracies.

Defendant's Position: This case reduces to the following. Kodak manufactures copiers and micrographic equipment. It sells that equipment in competition with the likes of Xerox, IBM, Bell and Howell and numerous Japanese firms, and by no means is a monopolist. Kodak also sells replacement parts and service needed to keep the equipment running. Plaintiffs purport to compete with Kodak by offering to service the Kodak equipment owned by Kodak's customers. Plaintiffs demand that Kodak provide them with the replacement parts they need to service Kodak equipment; they won't make their own parts or buy them from somebody else. But with some exceptions, Kodak's policy is not to sell them parts because it is burdensome to do so and Kodak does not want to support plaintiffs' free-riding.

Kodak believes that the fundamental issue presented in this action is one of law: may an equipment manufacturer like Kodak, which lacks market power in the relevant equipment markets, unilaterally decide for its own business reasons not to sell replacement parts to independent service organizations? Kodak submits that *Dimidovich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), modified, 810 F.2d 1517 (1987), *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (9th Cir. 1983), and *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972), unequivocally establish that it may do so.

This point of law is the foundation of Kodak's recently-filed motion for summary judgment. The only factual issues material to the motion are (1) the substance of Kodak's policies and (2) whether Kodak faces interbrand equipment competition that restrains its ability to charge monopolistic prices for service. Neither issue

should be disputed. Kodak's policies are what they are, and the existence of intense interbrand competition in both the copier and micrographics industries is obvious to anyone familiar with those industries. However, plaintiffs intend to dispute both issues and have indicated a desire to take broad, essentially unlimited discovery. Kodak objects to that and suggests that limitations on discovery be set at the status conference.

3. Identification of Issues

Plaintiffs' Position: The primary disputed legal issues regard the extent to which Kodak can, in its policies, practices and acts, refuse to sell parts to plaintiffs, prevent plaintiffs from obtaining parts, and exercise control over replacement parts and service for Kodak photocopy and micrographics equipment and used equipment.

The factual issues in dispute involve primarily issues regarding the actual practices and acts, not the policies of Kodak. Kodak, in its summary judgment motion, has with minor modifications, admitted that its policies are as stated in the Complaint. Plaintiffs contend the practices and acts of Kodak, including tying, monopolization, and combinations, contracts and conspiracies go beyond the stated policies which Kodak admits. Kodak disputes this.

Defendant's Position: The factual issues dispositive of this action are (1) the substance of Kodak's policies and (2) whether Kodak faces interbrand equipment competition that restrains its ability to charge monopolistic prices for service. Plaintiffs apparently intend to dispute Kodak's statement of these facts as contained in the pending summary judgment motion. Kodak believes that the

additional factual issues identified above by plaintiffs have been manufactured in order to evade the rule of *Dimidowich, Calculators Hawaii* and *Bushie*. Discovery should not be allowed on those issues unless plaintiffs can first come forward with a viable theory relevant to any proposed discovery and then make an offer of proof establishing cause to belief that discovery would be worthwhile.

4. Narrowing of Issues

Plaintiffs' Position: The summary judgment motion has been filed by defendant Kodak. This motion seeks to narrow substantially or dispose of issues in the case, including all antitrust issues. Plaintiffs do not agree that the issues can be narrowed by the summary judgment motion.

Defendant's Position: Kodak filed the pending summary judgment to dispose of or, at the very least, narrow the issues in this case and the attendant discovery. Until receiving plaintiffs' statement of anticipated discovery yesterday (included herein as Item 6), we thought we were at least making progress toward the latter goal. On August 28, the parties filed a stipulation with the Court stating their intention "to meet and confer to establish a specific discovery program with particular reference to those issues identified by the defendant's summary judgment motion." And the parties agreed that Kodak's motion "defines specific issues which may narrow the scope of this case." But quite frankly, plaintiffs' current position breaches those agreements and seems designed

to derail the process of narrowing the issues that was initiated by Kodak's motion.

When the parties met to establish the specific discovery program contemplated by their August 28 stipulation, plaintiffs proposed the broadest discovery program imaginable within the parameters of this case. That is evident from plaintiffs' response to Item 6. Plaintiffs expressly refused, for example, to identify specific conspiracies of which Kodak was or is allegedly a party, and instead fell back on the same sort of generic conspiracy allegations found in the complaint. Plaintiffs won't name any specific conspirators (except Kodak, of course), and their generic allegations capture *all* of Kodak's parts suppliers and customers. Similarly, two more of the "specific" areas that plaintiffs state they wish to take discovery on are "attempted monopolization of service" and "attempted monopolization of used equipment." The narrative descriptions of those subjects are even broader than the catch-all titles.

Kodak believes that the issues in this case can be — and were — substantially narrowed by the pending summary judgment motion. That motion laid out everything that is truly material to this case under the pertinent authorities. If plaintiffs wish to expand the issues, and clearly they do, they have the burden of coming forward with both a viable theory for expanding them and a preliminary offer of proof demonstrating that there is some likelihood the necessary discovery will be worthwhile. We thought plaintiffs had agreed to do that in this status conference statement. When they did not, we asked again that they do so. Plaintiffs still refused. Plaintiffs should now be required to make that showing at the

status conference so that the Court can set specific parameters of discovery and adjust the summary judgment briefing schedule as appropriate. If plaintiffs are unable to make an adequate showing, discovery and all further proceedings should be limited to the two dispositive issues as identified by Kodak's summary judgment motion: the substance of the challenged policies and the existence of interbrand equipment competition.

5. Relief

Plaintiffs seek temporary and permanent injunctive relief which would require Kodak to make parts available on a uniform basis to all customers, whether competitors or non-competitors, to make service available on a uniform basis to photocopy or micrographics equipment owners whether the machines were purchased from Kodak or a competitor and to prevent the practices and acts involved in the alleged contracts, combinations and conspiracies which stop third parties from supplying Kodak photocopy and micrographics parts to plaintiffs.

Additionally, monetary damages, based on the business losses of plaintiffs as a result of their inability to obtain parts and/or service for Kodak photocopy or micrographics machines will be sought. A damage study, showing the amount of these damages as to each plaintiff will be developed after sufficient discovery has taken place.

6. Discovery

Plaintiffs' Position: Plaintiffs, in response to defendant's motion for summary judgment, will present

specific evidence with specific individuals and companies identified to support each of the claims in their Complaint. Plaintiffs will request documents, propound interrogatories and take depositions in areas where they have specific evidence to support their claims.

These claims include (i) the "lock-in"; (ii) contract, combination or conspiracy with manufacturers of parts; (iii) contract, combination or conspiracy with parts customers; (iv) attempted monopolization of service; and (v) attempted monopolization of used equipment.

The following is an outline of the specific topics on which plaintiffs intend to take discovery. Following that is a description of each of the claims, the facts as to which discovery is required and the type of discovery needed, by topic.

Discovery Topics

1. Market definition (Kodak and Machine Owner documents, interrogatories and depositions)
 - a. Numbers of machines
 - b. Patterns of ownership of machines
 - c. Sales of new machines
 - i. Trade-ins
 - ii. Financing
 - d. Servicing of machines
 - i. CEDS
 - ii. EMA
 - iii. Per call

- e. Limitations on OEM parts
 - i. Patents
 - ii. Trade secrets
 - iii. Manufacturers' agreements or understandings
- 2. Parts, sales (Kodak, OEM customer documents, interrogatories and depositions)
 - a. Manufacture and inventory of parts
 - i. OEM/Kodak manufacture
 - ii. Inventories
 - iii. Demand for parts
 - b. Customers for parts
 - i. Kodak machine purchasers
 - ii. Service organizations
 - iii. Dealers
 - iv. ISO's
 - c. Parts policy and operation of policy
 - i. Basis of business justifications
 - d. Resale restrictions
- 3. Used machines (Kodak, OEM, customer documents, interrogatories and depositions)
 - a. Kodak purchase, resale
 - b. Third-party sales
 - c. Reconditioning
 - i. By Kodak
 - ii. By customer

- d. Certification policy and practices
 - i. Basis of business justifications

i) Lock-in

The lock-in issue involves plaintiffs' allegations that because of business practicalities including: the high capital cost of photocopy machines and micrographic machines; the restrictive policies of Kodak on resale of used equipment; the restriction on servicing of used equipment; and the control of the sale of parts, machine owners are not free to "switch" their equipment to another brand if Kodak's parts or service are unsatisfactory, and thus no competition exists. Kodak disputes that these are the facts. Discovery with regard to the disputed facts which will be used to demonstrate that customers are "locked-in" includes the following topic areas: 1 a-c, 2 c and 3 a-d.

ii) OEM Contract, Combination or Conspiracy

The OEM issue involves plaintiffs' allegation that Kodak has prevented them from obtaining from manufacturers other than Kodak parts to service or recondition Kodak machines. Kodak denies there are facts to support this. Discovery with regard to disputed facts of the restrictions on OEM parts from third parties include the following topic areas: 1 e and 2 a-c.

iii) Contract, Combination or Conspiracy with Parts Customers

This issue involves plaintiffs' allegations that Kodak sells parts to service or recondition machines to parties

with the agreement that these parts will not be sold to ISO's or reconditioners competing with Kodak. These parties include ISO's in certain non-competing geographic regions, small non-competing ISO's and purchasers of Kodak machines who compete incidentally but who buy other Kodak parts. Kodak denies that this "knowingly" occurs. Discovery with regard to the disputed facts on this issue include the following topic areas: 1 d, 2 b-c.

iv) Attempted Monopolization of Service

This issue involves plaintiffs' allegations that Kodak has attempted to put ISO's, equipment reconditioners and brokers out of the business of servicing, reconditioning and selling used Kodak machines through a number of actions including those set forth in i, ii and iii and using its control over parts to require Kodak service. Kodak denies these allegations and the underlying facts. Discovery with regard to the disputed facts on this issue will include the following topic areas: 1 a-d; 2 a-d.

v) Attempted Monopolization of Used Equipment

This issue involves plaintiffs' allegations that Kodak has attempted to put equipment reconditioners and brokers out of the business of reconditioning and selling used Kodak machines through a number of policies, including those set forth in i-iv, and discriminatory and unreasonable certification fees. Kodak denies these facts. Discovery with regard to the disputed facts on this issue include the following topic areas: 3 a-d.

Defendant's Position: As noted earlier, the only genuinely controverted factual issues that are material to the case are the substance of Kodak's policies and the question of whether interbrand equipment competition prevents Kodak from charging monopolistic prices for service. If plaintiffs have any basis to request specific discovery on these issues, Kodak will not object and is willing to defer consideration of its motion for summary judgment so that plaintiffs have a reasonable opportunity to take that discovery. This would include plaintiffs "lock-in" theory, although specific parameters for this should be discussed at the status conference.

All of the other factual disputes identified by plaintiffs have been manufactured to avoid summary judgment. It is no surprise, for example, that plaintiffs' category "iii" alleges conspiracies identical to that considered by the Ninth Circuit in *Dimidowich*. They make those allegations even though (a) Kodak does not utilize independent service agents or engage in dual distribution, the *sine qua non* of the *Dimidowich* ruling on hybrid conspiracies, and (b) plaintiffs cannot allege specific conspirators even when challenged to do so. Plaintiffs should not be allowed to take discovery on this conspiracy claim unless it can make an offer of proof at the status conference naming particular conspirators and conspiracies. Discovery should then be limited to proving or disproving those specific allegations.

Plaintiffs also want discovery regarding their allegation that Kodak has conspired with certain unnamed original equipment manufacturers to deny plaintiffs parts. Discovery on this theory should be denied even if plaintiffs can provide specifics and an offer of proof. Any such

conspiracy would be entirely vertical, and under *Dimidowich, Calculators Hawaii* and *Bushie, Kodak* would be entitled to summary judgment even if a conspiracy were presumed. See Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 35-36. There is, accordingly, nothing to be gained by taking discovery.

Finally, there is no basis for plaintiff taking discovery on its categories "iv" and "v," "attempted monopolization of service" and "attempted monopolization of used equipment." For the reasons stated in Kodak's summary judgment motion, the discovery contemplated by these catch-all categories is immaterial if Kodak is faced with interbrand equipment competition that limits its ability to exploit service or used equipment "markets." See *id.* at 27-28. Moreover, these categories are so broad and general that discovery pursuant to them would be without any meaningful limitations. There is no basis for general "fishing expedition" discovery given the pendency of Kodak's summary judgment motion.

As for Kodak's discovery plans, we have had document requests and interrogatories to plaintiffs outstanding since May. Plaintiffs have told us they intend to respond to them in late September. Kodak may or may not depose plaintiffs' affiants, depending on whether their testimony is truly material to our summary judgment motion. Kodak may also take some depositions based on plaintiffs' responses to the outstanding discovery, limited, of course, to the issues framed by the summary judgment motion.

7. Alternative Means of Disposition

The parties agree that this case is *not* suitable for reference to binding arbitration, to a master, or to a magistrate for trial.

8. Length of Trial

The parties agree that it is premature to estimate the length of trial, especially since the pending summary judgment motion may obviate the need for or limit the scope of trial.

9. Jury Trial

Plaintiff has demanded a jury trial.

10. Related Cases

There are no related cases.

11. Class Actions

Not Applicable.

12. Dates

Kodak submits that if discovery pertaining to the summary judgment motion is deemed proper, it should be limited to 90 days from the status conference (until December 10), and that all other discovery should be stayed pending the outcome of the motion. The parties agree that it is not advisable to set dates for discovery cutoff as to other issues, for the pretrial conference and

for trial until after the Court has ruled on Kodak's motion for summary judgment.

13. Settlement

There are no prospects for settlement, nor do the parties believe that settlement prospects would be enhanced at this time by a settlement conference.

14. Other Matters

None.

Dated: September 1, 1987.

Respectfully submitted,

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE,)	NO.
INC., a California corporation;)	C 87 1686 WWS
J-E-S-P, COMPANY, INC., a)	ORDER
New Jersey corporation;)	
SHIELDS BUSINESS)	
MACHINES, INC., a)	
Pennsylvania corporation;)	
MICROGRAPHIC SERVICES,)	
INC., a Missouri corporation;)	
MICRO MAINTENANCE, INC.,)	
an Illinois corporation;)	
ATLANTA GENERAL)	
MICROFILM CO., INC., a)	
Georgia corporation; ROGER)	
KATONA d/b/a G.&S.)	
ELECTRONICS, a California)	
partnership; AMTECH)	
EQUIPMENT MAINTENANCE,)	
INC., a Minnesota Corporation;)	
ADVANCED SYSTEMS)	
SERVICE, INC., a Colorado)	
corporation; B.C.S. TECHNICAL)	
SERVICES, INC., a Colorado)	
corporation; BOB INGLE, INC.,)	
a Missouri corporation; DATA)	
PROX EQUIPMENT CO., a New)	
Jersey corporation; FISHER)	
MICROGRAPHICS, INC., a)	
Missouri corporation; I.O.A.)	

DATA CORP., a New York)
 corporation; SEARLE)
 ENTERPRISES, INC., d/b/a)
 MICRO IMAGE, a Texas)
 corporation; MIDWEST)
 MICROFILM EQUIPMENT &)
 SERVICE, INC., a Minnesota)
 corporation; OMNI)
 MICROGRAPHIC SERVICES,)
 INC., a California corporation;)
 and CPO, LTD., a California)
 corporation,)
 Plaintiffs,)
 vs.)
 EASTMAN KODAK COMPANY,)
 a New Jersey corporation,)
 Defendant.)

IT IS HEREBY ORDERED, that the briefing schedule and hearing for defendant's Motion for Summary Judgment in this action, originally scheduled for hearing by Order of the Court of August 18, 1987, for 11:00 a.m. September 11, 1987, is hereby set as follows:

- a) September 18, 1987: Plaintiffs to file and serve opposition papers;
- b) October 23, 1987: Defendant to file and serve reply papers; and
- c) November 6, 1987: Hearing on Summary Judgment Motion, 11 A.m., Courtroom 9.

Said scheduling is conditioned upon counsel for plaintiffs and defendant meeting and conferring prior to the September 11, 1987 Status Conference to establish a specific discovery program with particular reference to issues defined by the defendant's summary judgment

motion, and on the submitting of said program in their status conference statement(s).

The Status Conference set for September 11, 1987 at 9:00 a.m. will take place as scheduled.

9/5/87

/s/ William W. Schwarzer
 WILLIAM W. SCHWARZER
 United States
 District Judge

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	No. C 87 1686 WWS
SERVICES, INC., et al.,	)	KODAK'S ANSWERS TO
Plaintiffs,	)	PLAINTIFFS' FIRST SET
v.	)	<u>OF INTERROGATORIES</u>
EASTMAN KODAK)	
COMPANY,)	
Defendant.)	

Defendant Eastman Kodak Company responds and answers to Plaintiffs' First Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Kodak objects to each interrogatory to the extent that it seeks information which is not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987.

2. Kodak objects to each interrogatory to the extent it seeks information protected by the attorney-client privilege or the work product doctrine.

3. Kodak objects to the definition of "Kodak" and "Defendant" on the ground that it is overbroad and unduly burdensome. In answering these interrogatories, Kodak has sought information from those of its employees reasonably likely to have responsive information and has reviewed documents and records reasonably likely to contain responsive information.

4. Kodak objects to the definitions of "identify" and "identity" with respect to both documents and persons on the ground that it is overbroad and unduly burdensome. Kodak will identify documents by providing a description of the document sufficient to seek it through appropriate discovery methods, and will identify persons by name. Unless otherwise indicated, all persons named in these answers are present or former employees of Kodak.

5. Kodak objects to the first paragraph of the "Instructions" on the ground that it is unduly burdensome. Kodak will furnish such information as is responsive to the interrogatories and which it has been able to obtain through the exercise of reasonable diligence.

6. Each General Objection is incorporated into each of the Specific Responses stated below.

SPECIFIC RESPONSES

INTERROGATORY NO. 1:

What were all of the factors causing defendant's change in the micrographics equipment replacement parts policy with respect to "new products" set out in the

April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1?

(a) Identify the persons involved in approving the policy change.

(b) Identify the documents on which these persons relied in approving the change.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the change relied.

(d) When did the process for the policy change begin?

(e) When was the decision made to change the policy?

(f) Has the policy been altered since the change?

(g) Does the practice ever vary in any way from the policy? If so, how and why?

RESPONSE TO INTERROGATORY NO. 1:

The business reasons for the referenced "new products" practice are set forth in the Declarations of Emmett A. Gross (¶¶6-10) and John A. Lacy (¶¶22-30), which are incorporated herein. Some are also stated in the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1.

a. John A. Lacy and Emmett A. Gross approved the referenced policy.

b. Other than the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1, Kodak is unaware of any documents relied on in approving the referenced policy.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that Donald B. Sanders, Robert J. Stankard, and Joseph M. O'Brien provided information to and advised Messrs. Lacy and Gross. Others may have been tangentially involved.

d. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous as to the meaning of the phrase "process for the policy change." Without waiving this objection, Kodak responds as follows: Kodak first began considering whether it should change its practices with respect to selling micrographics parts in the latter half of 1984 or early 1985. Kodak actively began to consider a new policy two to three months prior to the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1.

e. On or about April 12, 1985.

f. No.

g. Not to Kodak's knowledge, and not intentionally.

INTERROGATORY NO. 2:

What were all of the factors causing the defendant's change in the micrographics equipment replacement parts policy with respect to "older products" as set out in

the July 15, 1986 letter attached to the Lorenson Declaration as Exhibit 1?

(a) Identify the persons involved in approving the policy change.

(b) Identify the documents on which these persons relied in approving the change.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the change relied.

(d) When did the process for the policy change begin?

(e) When was the decision made to change the policy?

(f) Has the policy been altered since the change?

(g) Does the practice ever vary in any way from the policy? If so, how and why?

RESPONSE TO INTERROGATORY NO. 2:

Kodak objects to this interrogatory on the grounds that it is vague, ambiguous, and misstates the facts. The July 15, 1986 letter attached to the Lorenson Declaration as Exhibit 1 does not reflect a change in the then-existing policy with respect to parts for "older products." Rather, it implements the policy adopted on or about April 12, 1985 and reflected in the memorandum of that date attached to the Gross Declaration as Exhibit 1. Assuming that plaintiffs seek information about the April 12, 1985

policy change, Kodak refers to its response to Interrogatory No. 1. Assuming plaintiffs seek information about the July 15, 1986 letter, Kodak refers plaintiffs to the Declaration of Robert A. Lorenson (¶¶3-12).

a. John A. Lacy and Emmett A. Gross approved the referenced policy in April 1985. Robert A. Lorenson approved the text of the July 15, 1986 letter.

b. The April 12, 1985 memorandum was relied on in preparing the July 15, 1986 letter. Kodak is unaware of any additional documents responsive to this interrogatory.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that Donald B. Sanders, Robert J. Stankard, and Joseph M. O'Brien provided information to and advised Messrs. Lacy and Gross with respect to the April 1985 policy decision. Joseph M. O'Brien provided information and advised Mr. Lorenson with respect to the July 15, 1986 letter.

d. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous as to the meaning of the phrase "process for the policy change." Without waiving this objection, Kodak responds as follows: Kodak first began considering whether it should change its practices with respect to selling micrographics parts in the latter half of 1984 or early 1985. Kodak actively began to consider a new policy two to three months prior to the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1. Kodak began considering whether to

send a letter like the July 15, 1986 letter in approximately March 1986.

e. The policy was adopted on or about April 12, 1985.

f. No. See, however, the Declaration of Robert A. Lorenson (¶¶4-10, 17).

g. Kodak has not knowingly deviated from the referenced policy and makes every effort to enforce it consistently. As explained in the Declaration of Robert A. Lorenson, however, there have been instances when independent service organizations have been able to breach Kodak's enforcement procedures and obtain parts. Kodak does not know how this occurs.

INTERROGATORY NO. 3:

What were all of the factors causing defendant's change in the "CESD Replacement Parts Principles" on or about December 2, 1985, including but not limited to the language which stated:

KODAK DISTRIBUTES PARTS THROUGHOUT THE WORLD AND DOES NOT RELY UPON DEALERS, AGENTS OR DISTRIBUTORS IN THE U.S. TO PERFORM THIS DISTRIBUTION FUNCTION. THEREFORE, KODAK WILL SELL REPLACEMENT PARTS TO ANY PARTY WHO INTENDS TO USE THEM TO REPAIR KODAK EQUIPMENT.

(a) Identify the persons involved in approving the change.

(b) Identify the documents on which these persons relied in approving the change.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the change relied.

(d) When did the process for the change begin?

(e) When was the decision made to make the change?

(f) Why was the change made?

RESPONSE TO INTERROGATORY NO. 3:

The quoted language appeared on microfiche containing the complete CESD parts list. This list comprised thousands of parts for products marketed by numerous Kodak Business Units, not just micrographics and copier parts. Some of these Business Units allow CESD to sell replacement parts for their products to any party intending to repair Kodak equipment. In May of 1985, during a routine review of the so-called "CESD Replacement Parts Principles," Kodak personnel determined that the quoted language was inaccurate as applied to BISD and Copy Products parts. It was therefore deleted:

a. John C. Englert, Neil W. Farrar, Gordon A. Greenfield, Anthony E. Pellicia, Donald B. Sanders.

b. No currently identifiable documents were relied upon in approving the deletion of the quoted language.

c. Not applicable, since Kodak is unaware that any such analyses were undertaken.

d. May 1985.

e. The decision to make the change was made on or about June 10, 1985. The change was fully implemented when the parts list was revised and issued in December 1985.

f. See above.

INTERROGATORY NO. 4:

What were all of the factors causing defendant's change in the "Terms of Sale" for CESD replacement parts sales on or about December 1, 1986, including but not limited to adding the language which stated:

PARTS ARE STOCKED TO MEET THE REPAIR NEEDS OF KODAK'S AUTHORIZED DEALERS, DISTRIBUTORS, SERVICE OUTLETS, KODAK CUSTOMER EQUIPMENT SERVICES FIELD ENGINEERS AND EQUIPMENT SERVICE CENTERS, GOVERNMENT USERS, AND OTHER USERS WHO PURCHASED EQUIPMENT DIRECTLY FROM KODAK AND WHO SERVICE ONLY THEIR OWN KODAK EQUIPMENT.

(a) Identify the persons involved in approving the change.

(b) Identify the documents on which these persons relied in approving the change.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the change relied.

(d) When did the process for the change begin?

(e) When was the decision made to make the change?

(f) Why was the change made?

RESPONSE TO INTERROGATORY NO. 4:

The quoted language was added as a result of a routine review of the Terms of Sale which commenced in August of 1986. It was added to provide information regarding Kodak's business practices.

a. Neil W. Farrar, Robert A. Lorenson, Emmett A. Gross, Ronald A. Bern.

b. Other than the draft of the revised Terms of Sale, Kodak is unaware of any such documents.

c. Not applicable, since Kodak is unaware that any such analyses were undertaken.

d. August 1986.

e. September 11, 1986.

f. The quoted language was added simply to inform Kodak's customers of the facts stated. Certain customers not falling within the groups identified in the quoted language were previously informed that there might be delays in filling their orders for older micrographic equipment parts because such parts were not stocked for their benefit. The quoted language reiterated this message.

INTERROGATORY NO. 5:

What were all of the factors for defendant's policy not to sell photocopy replacement parts to persons for

use in the service or repair of other parties' photocopy equipment?

- (a) Identify the persons involved in adopting the policy.
- (b) Identify the documents on which these persons relied in adopting the policy.
- (c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons adopting the policy relied.
- (d) Has the policy been altered since its adoption?
- (e) Does the practice ever vary in any way from the policy? If so, how and why?

RESPONSE TO INTERROGATORY NO. 5:

The business reasons for the referenced policy are set forth in the Declarations of Michael J. Murray (¶¶23-32) and Emmett A. Gross (¶12), which are incorporated herein.

- a. Michael J. Murray approved the referenced policy.
- b. No currently identifiable documents were relied upon in approving the referenced policy.
- c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this

objection, Kodak answers that the following persons participated in the decisionmaking process: Michael J. Murray, Edward V. Ince, Joseph F. Iadorola, Joseph A. McGrain, Donald B. Sanders, Lynn Brockman Gleason, and John K. Secker.

- d. No.
- e. Not to Kodak's knowledge, and not intentionally.

INTERROGATORY NO. 6:

On what basis did defendant sell photocopy equipment replacement parts to each of the plaintiffs who purchased such parts from defendant?

- (a) Identify the persons approving and making the sales.
- (b) Identify the documents concerning the sales and on which these persons relied in approving the sales.

RESPONSE TO INTERROGATORY NO. 6:

Kodak objects to this interrogatory on the ground that it is unintelligible because it fails to identify the individual plaintiffs which have purchased copy parts from Kodak, and unduly burdensome to the extent that plaintiffs ask Kodak to determine whether it has ever sold copy parts to each plaintiff. Kodak is unable to answer this interrogatory fully until such time as plaintiffs provide this information and respond to the discovery requests that Kodak previously served on them. Without waiving this objection, Kodak responds as follows:

Kodak has never intentionally deviated from its policy not to sell unique copier parts to independent service organizations. To the extent that any of the plaintiffs have been able to purchase copier parts from Kodak, that is either the result of Kodak's inability to police its policy with 100% effectiveness, because certain parts are also used in other Kodak equipment for which plaintiffs may purchase parts, or for reasons unknown to Kodak.

a. Kodak has never knowingly approved such a sale since adopting and implementing the referenced policy. Without being provided with the details of a particular sale, Kodak is unable to identify the person or persons making any such sale.

b. Without being provided with the details of such sales, Kodak is unable to identify relevant documents.

INTERROGATORY NO. 7:

What were all of the factors causing defendant's subsequent refusal to sell photocopy equipment replacement parts to the plaintiffs who purchased such parts from defendant in the past.

(a) Identify the persons involved in the refusal.

(b) Identify the documents on which these persons relied in the refusal.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the refusal relied.

(d) When did the process for the change begin?

(e) When was the decision made to make the change?

(f) Has the policy been altered since the change?

RESPONSE TO INTERROGATORY NO. 7:

Kodak objects to this interrogatory on the ground that it is unintelligible because it fails to identify instances in which Kodak first sold copier parts to a plaintiff and later refused to do so. Without this information, Kodak cannot respond to the interrogatory. Kodak also objects to the interrogatory in the ground that it is vague and ambiguous, particularly sub-paragraphs (d), (e) and (f) (re "the change"). Without waiving this objection, Kodak refers plaintiffs to its Response to Interrogatory No. 5 regarding Kodak's business reasons for not selling copier parts to independent service organizations.

a. Not applicable.

b. Not applicable.

c. Not applicable.

d. Not applicable.

e. Not applicable.

f. Not applicable.

INTERROGATORY NO. 8:

Identify all persons other than plaintiffs who received the letter of July 15, 1986, attached to the Lorenson Declaration as Exhibit 1, and identify each letter.

RESPONSE TO INTERROGATORY NO. 8:

Kodak objects to this interrogatory on the ground that the identities of persons other than plaintiffs who were sent the July 15, 1986 letter is not relevant and is not likely to lead to the discovery of evidence relevant to this action. Without waiving this objection, a list of persons who were sent the letter or a later version of the letter is attached as Exhibit A hereto. Each listed person was sent the letter in a form substantially similar to Exhibit 1 to the Lorenson Declaration. The letter was also sent to BISD and CESD field and headquarters management.

INTERROGATORY NO. 9:

What were all of the factors which determined the content of the letters of July 15, 1986 and who received the letter of July 15, 1986 attached to the Lorenson Declaration as Exhibit 1?

(a) Identify the persons involved in approving the letter and identifying the persons to whom it was sent.

(b) Identify the documents on which these persons relied in approving the letter and identifying to whom it was sent.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the letter and identifying to whom it was sent relied.

(d) When did the process identifying the recipients of the letter begin?

(e) When was the decision made as to whom the letter was sent?

RESPONSE TO INTERROGATORY NO. 9:

Kodak objects to this interrogatory on the ground that it is vague and ambiguous as to the phrase "factors which determined the content of the letters." Without waiving these objections, Kodak responds as follows:

The Declaration of Robert A. Lorenson (¶¶ 2-4) states why Kodak sent out the letters. The purposes described by Mr. Lorenson determined the contents of the letters. Letters were sent to all persons known by Kodak to be in the business of providing third party service on Kodak micrographics equipment. The list of addressees was compiled from input received from Kodak field sales and service personnel. They were asked to identify persons and entities in their regions which were known to provide third party service. The collective input was assembled at Kodak's headquarters in Rochester, and the letters were sent from there.

a. Robert A. Lorenson approved the letter. The persons to whom it was sent are listed in response to Interrogatory No. 8.

b. Other than the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1, Kodak is unaware of any documents relied on in preparing the letter that are currently in its possession. In response to requests from Kodak personnel in Rochester, Kodak field

sales and service personnel sent lists of names to Rochester, but the original lists were discarded when the cumulative list was prepared.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that Robert A. Lorensen and Joseph M. O'Brien were responsible for preparing and disseminating the letter.

d. Approximately March 1986.

e. May 1986.

INTERROGATORY NO. 10

What were all of the factors causing adoption of defendant's policy and practices concerning service of used micrographics equipment as set out in the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1?

(a) Identify the persons involved in adopting the policy/practices.

(b) Identify the documents on which these persons relied in adopting the policy/practices.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons adopting the policy/practices relied.

(d) When did the process for the adoption of the policy/practices begin?

(e) When was the decision made to adopt the policy/practices?

(f) Have the policy/practices been altered since their adoption?

RESPONSE TO INTERROGATORY NO. 10:

The business reasons for the referenced policy are set forth in the Declarations of Emmett A. Gross (¶¶ 2-5) and John A. Lacy (¶¶ 31), which are incorporated herein. Some are also stated in the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1.

a. John A. Lacy and Emmett A. Gross approved the referenced policy.

b. Other than the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1, Kodak is unaware of any documents relied on in approving the referenced policy.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that Donald B. Sanders, Robert J. Stankard, and Joseph M. O'Brien participated in the decisionmaking process and advised Messrs. Lacy and Gross. Others may have been tangentially involved.

d. Kodak objects to this sub-paragraph on the ground that the phrase "process for the adoption of the policy/practices" is vague. Without waiving this objection, Kodak answers that its headquarters personnel first began receiving reports that CESD was being asked to

service resold but improperly maintained Kodak equipment in late 1984 or early 1985. These reports caused Kodak to review its policies with respect to servicing used equipment.

e. On or about April 12, 1985.

f. There have been some modifications to the details of the policy with respect to "per call" service, but the basic policy of not placing resold equipment under an EMA without first inspecting it and bringing it up to current performance expectations has not changed.

INTERROGATORY NO. 11

What were all of the factors causing adoption of defendant's policy or practices concerning service of used photocopy equipment as set out in the August 5, 1985 memorandum which is attached to the Murray Declaration as Exhibit 7?

(a) Identify the persons involved in adopting the policy/practices.

(b) Identify the documents on which these persons relied in adopting the policy/practices.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons adopting the policy/practices relied.

(d) When did the process for the adoption of the policy/practices begin?

(e) When was the decision made to adopt the policy/practices?

RESPONSE TO INTERROGATORY NO. 11:

The business reasons for the referenced policy are set forth in the Declarations of Michael J. Murray (¶¶ 33-34) and Emmett A. Gross (¶ 12), which are incorporated herein.

a. Michael J. Murray and Edward V. Ince approved the referenced policy.

b. No currently identifiable documents were relied upon in approving the referenced policy.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that the following persons participated in the decisionmaking process: Michael J. Murray, Edward V. Ince, Donald B. Sanders, Lynn Brockman Gleason, and John K. Secker.

d. Kodak objects to this sub-paragraph on the ground that the phrase "process for the adoption of the policy/practices" is vague. Without waiving this objection, Kodak answers as follows: during the second quarter of 1985.

e. Shortly before August 5, 1985.

INTERROGATORY NO. 12:

What were all of the factors causing defendant's change in the policy or practices concerning service of used photocopy equipment as set out in the October 18,

1985 memorandum which is attached to the Murray Declaration as Exhibit 8?

- (a) Identify the persons involved in approving the policy/practices change.
- (b) Identify the documents on which these persons relied in approving the change.
- (c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the change relied.
- (d) When did the process for the policy/practices change begin?
- (e) When was the decision made to change the policy/practices?
- (f) Have the policy/practices been altered since the change?

RESPONSE TO INTERROGATORY NO. 12:

The change in the policy reflected in the October 18, 1985 memorandum corrected an oversight in the original policy stated in the August 5, 1985 memorandum. Subsequent to August 5, Kodak learned that some resold copiers had been serviced by Kodak under an EMA continuously, that they had been stored and shipped properly, and thus met current performance expectations. Kodak was willing to service such copiers under an EMA, and did not want to charge customers for unnecessary inspection fees. Kodak therefore modified the policy so

that machines which had been under an EMA continuously could be placed under an EMA again, subject only to a pre-installation inspection for transportation or storage damage. Specific guidelines for implementing this policy were also established and are found in the October 18 memorandum, which is incorporated by reference.

- a. Michael J. Murray and Edward V. Ince approved the referenced policy.
- b. No currently identifiable documents were relied upon in approving the referenced policy.
- c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that the following persons participated in the decisionmaking process: Michael J. Murray, Edward V. Ince, Lynn Brockman Gleason, John Secker.
- d. Kodak objects to this sub-paragraph on the ground that the phrase "process for the policy/practices change" is vague. Without waiving this objection, Kodak answers as follows: approximately September 1985.
- e. Shortly before October 18, 1985.
- f. No.

INTERROGATORY NO. 13:

With respect to defendant's allegation in its Answer to the Complaint on file herein, that damages to plaintiffs "were not caused by Kodak but are the result of the

conduct of . . . plaintiff(s) including, without limitation, said plaintiff(s') undertaking contractual obligations to provide to customers Kodak supplies and parts that said plaintiffs at all times knew it (they) would be unable to purchase from Kodak," please state:

- (a) Each fact on which you base this allegation;
- (b) The identity of each document that concerns each fact which supports this allegation;
- (c) The identity of each person who has or claims to have any knowledge or information regarding any fact which supports this allegation.

RESPONSE TO INTERROGATORY NO. 13:

Kodak objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987. Kodak also objects to this interrogatory at this time because plaintiffs have not, even though they were required to do so five months ago, produced to Kodak interrogatory answers and documents relevant to this subject. Kodak will defer answering this interrogatory until after the summary judgment motion is decided, by which time it will have had an opportunity to review plaintiffs' discovery responses.

INTERROGATORY NO. 14:

With respect to defendant's allegation in its Answer to the Complaint on file herein, that "plaintiffs have . . . deliberately, fraudulently, and in bad faith concealed

from Kodak the material fact that they intended to resell the supplies and replacement parts purchased from Kodak, knowing that if that fact had been revealed, Kodak would not have sold them the supplies and parts requested," please state:

- (a) Each fact on which you base this allegation;
- (b) The identity of each document that concerns each fact which supports this allegation;
- (c) The identity of each person who has or claims to have any knowledge or information regarding any fact which supports this allegation.

RESPONSE TO INTERROGATORY NO. 14:

Kodak objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987. Kodak also objects to this interrogatory at this time because plaintiffs have not, even though they were required to do so five months ago, produced to Kodak interrogatory answers and documents relevant to this subject. Kodak will defer answering this interrogatory until after the summary judgment motion is decided, by which time it will have had an opportunity to review plaintiffs' discovery responses.

INTERROGATORY NO. 15:

With respect to defendant's allegation in its Answer to the Complaint on file herein, that "plaintiff(s) have . . . fraudulently, falsely, and in bad faith represented and

held themselves out to the public as able and entitled to purchase Kodak supplies and replacement parts from Kodak for resale to plaintiffs' customers, at all times knowing that said representations were false," please state:

- (a) Each fact on which you base this allegation;
- (b) The identity of each document that concerns each fact which supports this allegation;
- (c) The identity of each person who has or claims to have any knowledge or information regarding any fact which supports this allegation.

RESPONSE TO INTERROGATORY NO. 15:

Kodak objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987. Kodak also objects to this interrogatory at this time because plaintiffs have not, even though they were required to do so five months ago, produced to Kodak interrogatory answers and documents relevant to this subject. Kodak will defer answering this interrogatory until after the summary judgment motion is decided, by which time it will have had an opportunity to review plaintiffs' discovery responses.

INTERROGATORY NO. 16:

Identify all persons to whom Kodak sells micrographic or photocopy equipment replacement parts, other than pursuant to an EMA or on a "per call" basis, who do

not now own micrographic or photocopy equipment purchased directly from Kodak for which such parts could be used.

- (a) Identify each person who has knowledge or information of such sales;
- (b) Identify each document concerning all such sales.

RESPONSE TO INTERROGATORY NO. 16:

Kodak objects to this interrogatory on the ground that it is unduly burdensome and calls for information not in Kodak's possession and which Kodak cannot through the exercise of reasonable diligence obtain. The only persons whose identities are called for by this interrogatory whom Kodak can name are those to whom it sells older micrographic parts; they are listed in Exhibit A hereto. Kodak does not knowingly sell newer micrographic parts or copier parts, other than pursuant to an EMA or on a per call basis, to persons who do not own micrographic or photocopy equipment which they purchased directly from Kodak. However, Kodak cannot be sure that it is not inadvertently making such sales.

INTERROGATORY NO. 17:

Does defendant contend that the plaintiffs, or any of them, provide, or have provided, service for micrographics or photocopy equipment that is inferior to that provided by Kodak? Whether defendant's answer is in the affirmative or negative, please state the following:

- (a) Each fact on which you base this answer;

(b) The identity of each document concerning each fact that supports your answer;

(c) The identity of each person who has knowledge of such facts.

RESPONSE TO INTERROGATORY NO. 17:

Yes.

a. Kodak's service has long been recognized by independent surveys as the very best in both the copier and micrographics industries. In addition, there have been numerous instances when equipment owners have contacted Kodak for service because they were dissatisfied with the quality of ISO service. These include customers, such as agencies of the State of California, which were or are serviced by one of the plaintiffs. There are no ISOs which, to Kodak's knowledge, have invested in training nearly as heavily (even on a proportional basis) as Kodak, and by virtue of its superior knowledge of copier and micrographic technology, Kodak has proprietary diagnostic and service techniques which are unavailable to ISOs. Kodak also manufactures or procures all the parts it needs to service its customers.

b. Kodak objects to this sub-paragraph on the ground that it is overbroad and unduly burdensome. Kodak is unaware of any documents which specifically compare Kodak service versus that provided by one of the plaintiffs.

c. Kodak objects to this sub-paragraph on the ground that it is overbroad and unduly burdensome, particularly since many persons share the view that

Kodak service is the best in both the copier and micrographics industries. Michael J. Murray, John A. Lacy, Emmett A. Gross, Robert A. Lorensen and Edward V. Ince have knowledge of such facts.

INTERROGATORY NO. 18:

Does defendant contend that owners of micrographics or photocopy equipment have or would sell or would trade-in their equipment for other brands in any appreciable numbers in response to a rise in the price of service? Whether defendant's answer is in the affirmative or negative, please state the following:

(a) Each fact on which you base this answer;

(b) The identity of each document concerning each fact that supports your answer;

(c) The identity of each person who has knowledge of such facts.

RESPONSE TO INTERROGATORY NO. 18:

Yes.

a. Buyers of micrographics and copy equipment choose among competing vendors by, among other things, comparing relative costs over the lifetime of the equipment. In addition, buyers of micrographics equipment compare the relative costs of managing images through micrographics versus hard copy paper files. The "Selecting A Copier" publication by Datapro attached as Exhibit 6 to the Murray Declaration is an example of this; it recommends a method of comparing copier costs that

accounts for service costs over the lifetime of the copier. A significant increase in the total costs of utilizing Kodak products to perform their intended tasks, even if accomplished through a service price increase only, would result over time in a substantial decrease in Kodak's equipment sales and market share. This is basic economics, and it is Kodak's experience that economic principles apply in full force to the copier and micrographics industries. See the Declarations of Michael J. Murray (¶¶ 15-16) and John A. Lacy (¶¶ 14-18), incorporated herein, for additional responsive information.

b. Kodak will produce documents which set forth its service pricing for micrographics and copy products.

c. Michael J. Murray and John A. Lacy have knowledge of these facts, as do hundreds of micrographic and copy equipment salespeople and marketing and pricing specialists at Kodak and other companies. Kodak is unable to list all persons with knowledge of such basic facts.

INTERROGATORY NO. 19:

With respect to defendant's statement in its Memorandum that plaintiffs "refuse to make their own parts or obtain them from other sources" and "do not invest in high quality service, for example by investing in training," please state:

(a) Each fact on which you base this allegation;

(b) The identity of each document that concerns each fact which supports this allegation;

(c) The identity of each person who has or claims to have any knowledge or information which supports this allegation.

RESPONSE TO INTERROGATORY NO. 19:

Plaintiff objects to answering this interrogatory at this time because the information requested is primarily in the hands of the plaintiffs, who have not yet responded to Kodak's discovery requests on this subject. Kodak reserves the right to supplement its answer once discovery on this issue has been completed. Without waiving this objection, Kodak responds as follows:

a. The fact that plaintiffs refuse to make their own parts is obvious from their repeated attempts to obtain them from Kodak and from the filing of this lawsuit. It may be plaintiffs make some parts (Kodak is unaware of this), but as to each part that plaintiffs attempt to obtain from Kodak — which must logically be all the Parts at issue in this case — it must be that plaintiffs do not make that part. Otherwise there is no point to either plaintiffs' request to Kodak or to this case. Moreover, plaintiffs' counsel argued at the Status Conference in this case that plaintiffs cannot make their own parts because micrographics and copy equipment has a short useful life.

Kodak's belief that plaintiffs do not invest in training nearly to the extent that Kodak does (even on a proportional basis) is derived from observations about the poor quality of ISO service and the absence of any evidence to the contrary. Kodak does not deny that plaintiffs train their employees to some minimal extent, but the quality

of ISO technicians is, at best, uneven, which Kodak attributes in part to poor training.

b. The document establishing that plaintiffs do not make their own parts is the Complaint in this action, which alleges that plaintiffs are unable to obtain the parts at issue in this case from sources other than Kodak (P 22). Kodak must defer identifying documents relating to training by plaintiffs until discovery on this issue is completed.

c. Michael J. Murray, John A. Lacy, Emmett A. Gross, Robert A. Lorensen and Edward V. Ince have knowledge of such facts, but they will be developed primarily from plaintiffs' principals and employees.

INTERROGATORY NO. 20:

Does defendant sell micrographics and photocopy equipment replacement parts to owners who have purchased their equipment directly from Kodak where such parts are for use in servicing that equipment through independently contracted labor. Whether defendant's answer is in the affirmative or negative, please state the following:

- (a) Each fact on which you base this answer;
- (b) The basis for this policy/practice;
- (c) The identity of each document concerning each fact that supports the basis for this policy/practice;
- (d) The identity of each person who has information or knowledge of such facts.

RESPONSE TO INTERROGATORY NO. 20:

Kodak objects to this interrogatory on the ground that it is vague and ambiguous as to the meaning of the phrase "independently contracted labor." Without waiving this objection, Kodak responds as follows, assuming that "independently contracted labor" refers to ISOs:

Kodak prefers not to sell newer micrographic equipment parts or copier parts under these conditions. However, Kodak has no effective means to prevent direct equipment customers from purchasing parts, ostensibly to perform their own service, when in fact they have an ISO service their equipment. Kodak suspects that it has sold parts to its customers under these conditions.

a. Kodak's replacement parts policies and the business reasons therefor are stated in response to Interrogatory Nos. 1, 2, and 5.

b. Kodak's replacement parts policies and the business reasons therefor are stated in response to Interrogatory Nos. 1, 2, and 5.

c. April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1; July 15, 1986 letter attached to the Lorensen Declaration as Exhibit 1; August 5, 1985 memorandum attached to the Murray Declaration as Exhibit 7.

d. Michael J. Murray, John A. Lacy, Emmett A. Gross, Robert A. Lorensen, Joseph M. O'Brien, Lynn Brockman Gleason and Edward V. Ince have knowledge of such facts, as do many other Kodak employees charged

with implementing the policies (for example, most Customer Service Assistants). It is impracticable to identify all such persons.

INTERROGATORY NO. 21:

Identify all geographic areas or locations in the United States where defendant does not offer service on micrographic and/or photocopy equipment.

RESPONSE TO INTERROGATORY NO. 21:

Kodak objects to this interrogatory on the ground that it is unduly burdensome to list each geographic area in which it does not offer service on Kodak Ektaprint copiers. Without waiving this objection, Kodak responds as follows:

In general, Kodak sells and services its Ektaprint copiers only in populous areas. There are, consequently, hundreds or thousands (depending on how one wishes to count them) of rural and lightly populated areas in which Kodak does not offer copier service. In response to this Interrogatory, Kodak will produce a list of those cities in which copier service is available from Kodak.

Kodak services micrographic equipment throughout the United States, except for some parts of Alaska.

INTERROGATORY NO. 22:

Identify all persons who offer service on micrographic and/or photocopy equipment in each area or location identified in response to Interrogatory No. 21.

RESPONSE TO INTERROGATORY NO. 22:

Kodak objects to this interrogatory on the ground that is vague and ambiguous. It does not specify whether information is requested with respect to service on all micrographic and copy equipment, or just Kodak equipment. It also fails to specify whether it is seeking information regarding service offered by ISOs or by independent firms on behalf of Kodak (there are no such firms). Kodak also objects to this interrogatory on the ground that it seeks information which is neither relevant, nor likely to lead to the discovery of information relevant, to the issues in this case, and is unduly burdensome. Lastly, Kodak objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987.

INTERROGATORY NO. 23:

Does defendant supply any of the persons identified in the response to Interrogatory No. 22 with micrographics and/or photocopy replacement parts?

- (a) If so, what are the terms and conditions of sale?
- (b) Are there any restrictions on the use or resale of those parts?
- (c) Identify all documents concerning such sales.
- (d) Identify each person who has knowledge or information of such sales.

RESPONSE TO INTERROGATORY NO. 23:

Not applicable. Kodak does not have any relations with independent firms by which such firms provide copier or micrographic service on Kodak's behalf in any region of the United States, and thus does not sell parts to any such firms.

INTERROGATORY NO. 24:

Has defendant made any studies of the micrographics or photocopy equipment replacement parts or service markets? If so, please state the following:

- (a) The identity of all documents concerning said studies.
- (b) The identity of all persons having knowledge or information of said studies.
- (c) The name of the custodian of records for any such studies and the documents supporting them.

RESPONSE TO INTERROGATORY NO. 24:

Kodak objects to this interrogatory on the ground that it is vague, ambiguous and overbroad. Kodak specifically objects to the phrase "studies of the micrographics or photocopy equipment replacement parts or service markets." First, Kodak does not recognize that there are any such markets, so it has no studies of them. Second, the word "studies" without modification, limitation or definition is vague and overbroad. Without waiving this objection, Kodak responds as follows:

Kodak has no studies of any assumed "replacement parts market." Kodak has performed studies relating to service issues, in particular customer satisfaction surveys. We do not interpret this interrogatory to call for the identification of such surveys, but we will produce them if requested to do so. Kodak has also prepared studies of service competition between copier manufacturers, and those will be produced.

- a. Kodak's studies of service competition between copier manufacturers will be produced.
- b. Michael J. Murray, Jeffrey L. Bradley, Peter J. Landers, Amy D. McHale
- c. Jeffrey L. Bradley

INTERROGATORY NO. 25:

Does defendant contend that owners of Kodak micrographics or photocopy equipment do not constitute a "relevant market" for replacement parts and for service of such equipment? If defendant's answer is in the negative, please state in detail:

- (a) Each fact on which you base your answer;
- (b) The identity of each document concerning each fact supporting your contention;
- (c) The identity of each person who has or claims to have any knowledge or information concerning any fact supporting your contention.

RESPONSE TO INTERROGATORY NO. 25:

Kodak objects to this interrogatory on the ground that it is unintelligible because plaintiffs fail to state the purpose for which owners of Kodak micrographics or photocopy equipment might constitute a "relevant market." Kodak also objects to this interrogatory because the question of whether a particular market, assuming it exists in fact, is relevant to the antitrust analysis of a particular allegation is one of law. Without waiving these objections, Kodak responds as follows:

As stated in Kodak's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment (pp. 27-28 & n.4), it is unnecessary to determine whether, as a matter of fact, there are distinct markets for parts or service in which the only consumers are owners of Kodak equipment. That is because, as a matter of law, the undisputed fact that Kodak is not a monopolist in the relevant interbrand equipment markets disposes of this case. Therefore, without waiving its right to make such a contention in the future, at this time Kodak neither contends that there are, nor that there are not, distinct markets for parts or service in which the only consumers are owners of Kodak equipment.

- a. Not applicable.
- b. Not applicable.
- c. Not applicable.

INTERROGATORY NO. 26:

What does defendant contend the relevant market for the purpose of this litigation should be defined as?

- (a) State each fact on which you base this definition;
- (b) Identify each document which supports this definition;
- (c) Identify each person who has or claims to have knowledge concerning this definition.

RESPONSE TO INTERROGATORY NO. 26:

Given the theory of plaintiffs' Complaint, *i.e.*, that Kodak has anticompetitively leveraged its control over replacement parts to monopolize service markets, it would be necessary at trial for the plaintiffs to define two types of relevant markets and prove Kodak's market power in both types: first, the markets from which Kodak's control over parts derives; and second, the service markets which Kodak is trying to monopolize by using its alleged control of parts. Because Kodak's supplies of replacement parts are an incident of its status as an equipment manufacturer and vendor, Kodak contends that plaintiffs must first prove that Kodak has monopoly power in the interbrand micrographics and copy equipment markets. It is undisputed that Kodak lacks market power in those markets. Consequently, it is unnecessary to determine whether Kodak has market power in any service markets, however defined, and so without waiving its right to do so in the future, Kodak does not at this time make a contention with respect to the contours of the relevant service markets.

INTERROGATORY NO. 27:

Identify, by parts number, each replacement part for micrographics or photocopy equipment which Kodak claims is protected by patents or trade secrets.

RESPONSE TO INTERROGATORY NO. 27:

Kodak objects to this interrogatory on the ground that it seeks information which is not relevant, and which is not likely to lead to the discovery of information relevant, to this action. Kodak also objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987. Lastly, Kodak objects to this interrogatory because it is unduly burdensome. Kodak's Ektaprint copiers have over 10,000 parts, its micrographics and other business imaging equipment have approximately 20,000 parts, and it has nearly 900 patents in the fields of electrophotography, copying and microimaging. Kodak has never attempted to correlate, item by item, its patents to particular equipment parts, and it would be extremely time-consuming and expensive to do so.

INTERROGATORY NO. 28:

With respect to defendant's statement in its Memorandum that owners of Kodak micrographics and photocopy equipment would (or do) readily switch to some other manufacturer's equipment in response to monopoly prices in service or parts, please state the following in detail:

- (a) Each fact on which you base your contention;
- (b) The identity of each document concerning each fact that supports your contention;
- (c) The identity of each person who has or claims to have knowledge or information concerning any fact supporting your contention.

RESPONSE TO INTERROGATORY NO. 28:

Kodak objects to this interrogatory on the grounds that it is duplicative of Interrogatory No. 18. Without waiving this objection, Kodak responds: see Response to Interrogatory No. 18.

INTERROGATORY NO. 29:

State each and every action defendant has taken to enforce in practice its stated policies set out in Interrogatories Nos. 1, 2 and 5, including but not limited to: 1) matching owners of micrographics or photocopy equipment to purchasers of replacement parts; 2) terminating sales of replacement parts to "service bureaus," "resellers," "copy shops" or other customers who service other than their own machines; and 3) terminating sales of replacement parts to customers who resell such parts.

- (a) Identify all documents concerning such actions.
- (b) Identify all persons having information or knowledge of such actions.

RESPONSE TO INTERROGATORY NO. 29:

Kodak objects to this interrogatory on the grounds that it is unduly burdensome for Kodak to be required to "state each and every action," however important or trivial, taken to enforce the referenced policies. Without waiving this objection, Kodak responds as follows:

Re Copy Products: In August 1985 written guidelines were established and distributed to promote uniformity of response to requests for copier parts. See Exhibit 7 to the Murray Declaration. Subsequently, a documented process for handling requests for copier parts by entities ineligible to buy them was established. In the computer used by the Customer Service Assistants ("CSA") who receive parts orders, copier parts were designated "Controlled Distribution-5" ("CD-5"). Also, attempts were made to identify entities eligible and ineligible to buy copier parts. When a customer attempts to order a copier part, the CD-5 designation appears on the CSA's computer screen together with, if available, information as to the customer's eligibility to buy the part. If eligibility information is available the CSA determines whether to sell the part; otherwise, the order is referred to a Controlled Distribution Customer Service Assistant, who investigates the customer's eligibility and determines whether to sell the part.

Kodak attempts to identify instances in which customers buy copier parts ostensibly to service their own equipment, but actually provide them to ISOs. We have, however, no effective means to do so and have been unable to do so. Therefore, Kodak has not terminated sales of copier parts to any service bureaus, resellers,

copy shops or customers who may be providing third party service or reselling parts.

a. Responsive documents will be produced.

b. Emmett A. Cross, Lynn Brockman Gleason, Sue Atkinson, Neil W. Farrar, and others too numerous to identify.

Re BISD: BISD has also utilized CD-5 codes to alert a CSA receiving a parts order that the part has restricted distribution. Entities which have been identified as Business Equipment Non-Users ("BENUs") are not sold parts for newer products and must have their orders for older product parts cleared by a Parts Planner. See Declaration of Robert A. Lorensen at ¶¶ 8-10; see also Response to Interrogatory Nos. 8 & 9. This list is updated quarterly. As described in the Lorensen Declaration, a new procedure to identify orders from ineligible customers is being developed at this time.

Kodak attempts to identify instances in which customers buy micrographics parts ostensibly to service their own equipment, but actually provide them to ISOs. We have, however, no effective means to do so and have been unable to do so. Kodak has thus not terminated sales of micrographics parts to any service bureaus, resellers, copy shops or customers who may be providing third party service or reselling parts.

a. Responsive documents will be produced.

b. Robert A. Lorensen, Joseph M. O'Brien, Charles A. Carson, Neil W. Farrar, and others too numerous to identify.

Division, were prepared from company sources, including its books and records, and that he believes them to be true.

/s/ Edward J. Greco

Sworn to me this 22nd day
of October, 1987.

/s/ Luanne Cenci
Notary Public

LUANNE CENCI
Notary Public in the State
of New York
MONROE COUNTY
My Commission Expires
8/31/89

STATE OF NEW YORK)
) ss:
COUNTY OF MONROE)

CHARLES L. TROWBRIDGE, being first sworn, says that he is Vice President and General Manager, Copy Products Division, Eastman Kodak Company, and states on information and belief that the Answers to Plaintiffs' First Set of Interrogatories herein, to they extent they relate to the activities of the Copy Products Division, were prepared from company sources, including its books and records, and that he believes them to be true.

/s/ Charles L. Trowbridge

Sworn to me this 21st day
of October, 1987.

/s/ Jonathan W. Romeyn
Notary Public

JONATHAN W. ROMEYN
Notary Public in the State
of New York
MONROE COUNTY, N. Y.
My Commission Expires
Feb. 28, 1990

EXHIBIT A
LIST OF NON-USERS

A.A.A. MICRO, INC.
1795 RIVER SIDE ROAD
ROSWELL, GA 30076

A-ABC APPLIANCE
2206 N.W. LOOP 410
SAN ANTONIA, TX 78230

AALPHA MICROGRAPHICS
3117 20TH STREET
SAN FRANCISCO, CA 94110

A.B.E. ELECTRONIC/BUSINESS
831 WOOD STREET
BETHLEHEM, PA 18018

ADR MICROFILM SERVICES
P.O. BOX 161372
AUSTIN, TX 78176-1372

ADVANCED MICROGRAPHICS
30429 W. 8 MILE RD.
LIVONIA, MI 48152

ADVANCED SYSTEMS SVS. INC
1525 WEST BAYAUD
DENVER, CO 80223

A&E ENTERPRISES
1507 NORTH PORTLAND AVE.
OKLAHOMA CITY, OK 73107

MR. ALEX RODRIGUEZ
517 PARK TOWN DRIVE
BEER PARK, TX 77536

ALLIED TECHNOLOGY
7800 BISSONNETT, SUITE 160
HOUSTON, TX 77074

ALLSTATE MICROFILM
801 E. BALL ROAD
ANAHEIM, CA 92805

AMERICAN MICROFILM SVC.
120 W. ILLINOIS
CHICAGO, IL 60610

AMTECH EQUIP. MAINT.
P. O. BOX 75013
ST. PAUL, MN 55175

ANACOMP
100 PRESTIGE PARK RD.
E. HARTFORD, CT 06108

APPIED MICROFILM
2175 DE LA CRUZ BLVD.
SANTA CLARA, CA 95050
408/727-6371

A.R.S.
815 NORTH CENTRAL, SUITE F
MEDFORD, OR 97501

ART SERVICE OFFICE
197 HAVAMEYER
NEW YORK, NY 11211

ATLANTA GENERAL MICROFILM.
3060 PHARR CT.
ALTANTA, GA 30305

AUSTIN MICROGRAPHICS
2008 OXFORD
AUSTIN, TX 78704

BCS INC.
1517-C S. SHERIDAN RD.
TULSA, OK 74112

BCS INC. & BCS TECH. SERV.
1285 W. BYERS PLACE
DENVER, CO 80223

BMI
KANSAS CITY, MO

BOB ENGLE INC.
405 THOMPSON AVE.
EXCELSIOR SPR., MO 64024

BRIGHTMAN HOME CTR.
3739 N. BROAD STREET
KANSAS CITY, MO 64102

B.S.P.I.
1507 N. PORTLAND
OKLAHOMA CITY, OK 73107

MR. D. BUSH
1061 SOUTH CRAIG
SPRINGFIELD, MA 65804

BUTLER BUSINESS SYSTEMS
1440 CHATTAHOOCHEE AVENUE
ATLANTA, GA 30318

CAM-DEX
1600 GENESEE STREET
KANSAS CITY, MO 64102

CAPITAL MICROFILMING
7950 ANDERSON SQUARE
SUITE 108
AUSTIN, TX 78744

CAPITOL TECHNIGRAPHICS
8002 D-HAUGE COURT
SPRINGFIELD, VA 22150

CATALINA SPECIALITY
4709 BAYSIDE DRIVE
AUSTIN, TX 78744

CERTEX
3705 SOUTH JENSION STREET
ENGLEWOOD, CO 80110

CHARLES NORDSTROM
1117 128TH AVE.
NE BLAINE, MN 55434

CHECKWRITER COMPANY
251 WEST 30TH STREET
NEW YORK, NY 10001

COLORADO BUSINESS MACHINES
3430 TWEETY BOULEVARD
SOUTHGATE, CA 90280

COM MICROFILM
1017-19 W. LAWRENCE
SPRINGFIELD, IL 62704

COMPUTER DYNAMICS
4900 RICHMOND SQUARE
OKLAHOMA CITY, OK 73118

COMPUTER PERIPHERAL SERVICES
11814 GOLDEN PINE
HOUSTON, TX 77070

COMSTOR
111 NORTH 56TH STREET
LINCOLN, NE 68505

COMSTOR PRODUCTIVITY CTRS.
111 N. 56TH SUITE 206
LINCOLN, NE 68508

CONCEPT MICROFILM
3337 REPUBLIC AVE.
MINNEAPOLIS, MN 55420

CUSTOM MICROFILM
6422 SAN FERNANDO ROAD
GLENDALE, CA 91201

DATA IMAGE, INC.
5462 S. 94TH E. AVENUE
TULSA, OK 74145

DATA TRADE CORPORATION
1780 NW 7TH
MIAMI, FL 33125

D.K.M. MICROSERVICES, INC.
6804 TORRESDALE AVENUE
PHILADELPHIA, PA 19135

ELECTRONIC MICROFILM SPEC.
(EMS)
5713 AMETHYST
ALTA LOMA, CA 91201

EMS
ELECTRONIC MICROFILM SVC.
5713 AMETHYST
ALTA LOMA, CA 91701

EQUIPMENT MICROGRAPHICS
905 TRURO LANE
CRAFTON, MD 21114

EQUIPMENT WHOLESALERS
576 HANOVER
AURORA, CO 80010

EXECUTIVE MICROFILM SERV.
2709 WILLARD ROAD
RICHMOND, VA 23229

FISHER MICROGRAPHICS
12261 BELLENTONTAIRE ROAD
ST. LOUIS, MO 63138

FLORIDA MICROFILM
HWY. 231 S.
DOTHAM, AL 36301

FREDERICK LUTHER CO.
2803 E. 56 CT.
INDIANAPOLIS, IN 46220

G. & G. MICROGRAPHICS 7/31/87
217 WEST COMMERCIAL STREET
SPRINGFIELD, MO 65803

G&S ELECTRONICS
13375 RAMONA
CHINO, CA 91710

GREAT LAKES MICROFILM
4417 S. ARCHER
CHICAGO, IL 60632

H. NOYD MICROFILM
225 N. MAIN STREET
NORTH CANTON, OH 44720

HOSPITAL MICROFILM
386 HONNICUTT ROAD
MAPLETOWN, GA 30059

IMAGE SYSTEMS
803 W. FRONT STREET
TRAVERSE CITY, MI 49684

IMAGES MICROFILM SVC.
3433 ILOSSMOOR ROAD
HOMEWOOD, IL 60430

INDEPENDENT MICROFILM CO.
1821 EASTBROOK SE
ISLAND RAPIDS, MI 49508

INFOGRAPHICS
23077 GREENFIELD ROAD
SOUTHHELD, MI 48075

INFORMATION SYSTEM MAINT.
2915 CLASSEN BLVD. SU. 175
OKLAHOMA CITY, OK 73106

INMAN SUPPLIER & SVC.
SPRINGFIELD, MO 65800

ITS
4443 AUBURN BLVD.
SUITE N
SACRAMENTO, CA 95841

J. J. EXON
4600 W. STREET
LINCOLN, NE 68503

JACK ELLIOTT INDUSTRIES
1512 WEST 34TH STREET
HOUSTON, TX 77018

JANIS LEATH
504 MELTON DRIVE #6
CHEYENNE, WY 82009

J-E-S-P COMPANY INC.
77 MILLTOWN ROAD
E. BRUNSWICK, NJ 08816

JORM MICROLAB
1101 27TH AVE. SW
CEDAR RAPIDS, IA 52404

KANSAS BUSINESS SYSTEMS
201 N. ST. FRANCIS
WICHITA, KS 67200

KEN MEYERS
7015 FORREST WAY
SAN ANTONIO, TX 78240

KEY MICROGRAPHICS
1617 MAIN STREET
WICHITA, KS 64108

KEYSTER KOM COMPANY
119 N. HARRISON
ALEXANDRIA, IN 46001

KLR AUDIOVISUAL INC.
2929 MONTE VIS
ALBUQUERQUE, NM 87100

LA MODERNA OFFICE TRONICS
197 HAVAMEYER
NEW YORK, NY 11211

LOYOLA NOTRE DAME LIBRARY
200 WINSTON AVE.
BALTIMORE, MD 21212

LYNN MICROFILM
350 TERRELL DRIVE
MARIETTA, GA 30064

MANAGEMENT RESOURCES PROJECTS
1703 INDUSTRIAL DRIVE
EXCELSIOR SPRINGS, MO 64024

MARTINS MICROFILM
2022 PREYWAY 104
CORPUS CHRISTI, TX 78412

MERELCO, INC.
813 N. MAIN STREET
SEMINOLE, OK 74868

METRO MICROGRAPHICS
1806 WEST STASSNEY LANE
AUSTIN, TX 78745-3621

MICRO DATA
FAIRPORT, NY

MICRO IMAGE
6539 LYNNGATE DRIVE
SPRING, TX 77373

MICRO MAINTENANCE
6000 W. 79TH STREET
BURBANK, IL 60459

MICROBIZ SECURITY
444 JESSRE STREET
SAN FRANCISCO, CA 94103

MICROFILM EQUIPMENT SERVICES
2063 BEECHMONT AVENUE
CINCINNATI, OH 45230

MICROFILM INFO SERVICES
2252 FOXHEIGHTS LANE
GREENBAY, WI 53403

MICROFILM SERVICE
2405 G. E. ROAD
BLOOMINGTON, IL 61701

MICROFILM SERVICES LIMITED
ROUTE 7, BOX 213
CHARLOTTSVILLE, VA 22901

MICORFILM SPECIALTY
1902 S. TREADWAY
ABILENE, TX 79602

MICROFIX
11360 CHERRYHILL ROAD
BETTSVILLE, MD 20705

MICROFORM SYSTEMS
906 S. LAND AVE.
LANSING, MI 48910

MICROGRAPHIC EQUIPMENT SVC.
241 W. TAFT DRIVE
SOUTH HOLLAND, IL 60473

MICROGRAPHICS
11 TALL PINES DRIVE, ROUTE 4
TYLER, TX 75703

MICROGRAPHICS MAINTENANCE
2905 WASHINGTON LANE
HATFIELD, PA 19440

MICROGRAPHICS SERVICE
113 CLEMENS COURT
LANSDALE, PA 19446

MICROGRAPHICS SERVICES
2519 WEST, I-40
OKLAHOMA CITY, OK 73101

MICROGRAPHIC SERVICES
931 N. WALNUT
REPUBLIC, MO 65738

MICROIMAGE TECHNOLOGY INC.
327 S. LASALLE STREET
CHICAGO, IL 60604

MICROMATION SERVICES
5TH - CHESTNUT STREETS
PHILADELPHIA, PA 19106

MICROPLAN, INC.
121 WEST DERVEY
WICHITA, KS 67202

MICROPLEX (3/12/87)
607 CEDAR STREET
CEDAR HILL, TX 75104

MICROPROCOL LIMITED
5423 KNOLL TERRACE DRIVE
KINGWOOD, TX 77339

MICRO-SECURITY INC.
129 WEST B. STREET
HUTCHINSON, KS 67501

MICROTECHNOLOGY
4448 BELLEVIEW
KANSAS CITY, MO 64111

MICRO. EQUIP. DESIGN INC.
905 TRURO LANE
CROFTON, MD 21114

MIDWEST MICROFILM
6126 HIGHWAY 55
GOLDEN VALLEY, MN 55422

MK BUSINESS MACHINES
140 HUYSHOPE AVE.
HARTFORD, CT 06106

MOBIL CHEMICAL CO.
CORPORATE ACCT. PAY.
MACEDON, NY 1450

MOUNTAINSIDE MICROGRAPHICS
5475 PEORIA, BUILDING 4, SUITE E
DENVER, CO 80239

MR. ALFONSO SILVA
1217 ALEXIS #5
FORT WORTH, TX 76112

MR. BERNARD JONES
917 BEECH LANE
BIRMINGHAM, AL 35213

MR. FRANK ALDO
4921 MADISON AVENUE
TRUMBULL, CT 06611

NATIONAL MICRO SALES
45 SEYMOUR STREET
STRATFORD, CT 06497

NATIONAL MICRO SYS. INC.
1003 NORFOLK SQUARE
NORFOLK, VA 23502

NORTHSTAR MICROFILM
615 S. STEPHENSON
IRON MOUNTAIN, MI 49801

NORTHEAST MICROGRAPHICS
67 NORTH BRANFORD ROAD
BRANFORD, CT 06405

NORTHWEST MICROFILM, INC.
SPAGUE-RITCHEY ROADS
REARDAN, WA 99029

OKLAHOMA CRISTIAN COLLEGE
2501 E. MEMORIAL ROAD
OKLAHOMA CITY, OK 73111

OMNI MICROGRAPHICS, INC.
663 FRONTAGE ROAD
MILPITAS, CA 95035

PICARO MICROFILM
9507-SUMMERBELL ROAD
HOUSTON, TX 77074

PHILA MICROGRAPHICS
158 GAITHER DRIVE
MT. LAURIE, NJ 08054

PHOTOGRAPHIC EQUIPMENT SERVICE
2016 CATHEDRAL WAY
MOBILE, AL 36609

PIONEER MICROFILMING
228 S. MILL STREET
S. LYON, MI 48178

PRECISE MICROFILM
45 VASSON ROAD
FEEDING, MA 01030

PROFESSIONAL MICROGRAPHICS
1708 KENDLEWOOD
MCALLEN, TX 78501

PRECISION MICROFILM
9520 GRAVIOS
ST. LOUIS, MO 63123

PWA INC.
7100 NW 63RD
BETHANY, OK 73008

Q. C. MICROFILM SYS.
12198 CR 250
SURANGO, CO 81301

QUALITY RECORDER. SERV.
1271 W. LITTLETON BLVD.
LITTLETON, CO 80120

RACHAEL MERCURIO
570 BOOTH HILL ROAD
TRUMBULL, CT 06611

R. K. COMPANY
P. O. BOX 37456
SHREVESPORT, LA 71109

R. L. MICROFILM SYS.
1655 PHILMONT AVE.
FEASTERVILLE, PA 19047

RECORDS CONVERSION - HOUSTON
1512 WEST 34TH STREET
HOUSTON, TX 77018

RECORDS INFO SYSTEMS
2470 JOEFIELD ROAD
DALLAS, TX 75229

REPUBLIC MICROFILM
REPUBLIC, MO

SATINFIELD CORPORATION
445 FIFTH AVENUE, ROOM F
NEW YORK, NY 10016

SCIENCE MANAGEMENT CORP.
8300 PROFESSIONAL PL.
SUITE 330

SHIELDS BUSINESS MACHINE
410 N. 8TH STREET
PHILADELPHIA, PA 19123

SOLU-TECH
3300 PRINCETON DRIVE, NE
ALBUQUERQUE, NM 87107

SOUTHWEST BANKING SYSTEMS
P.O. BOX 611
DALLAS, TX 75221

SOUTHWEST UNLIMITED
4911 CALIENTE
ARLINGTON, TX 76017

SOUTHERN AVIONIC
4297 SOUTH WEST 75TH AVENUE
MIAMI, FL 33166

ST. LOUIS PHOTO SUPPLY COMPANY
3456 LINDELL BOULEVARD
ST. LOUIS, MO 63103

JIM STEMPERT
496 SEDGWICK AVENUE
STARDFORD, CT 06497

TECHNICAL & TECH REPAIR S.
10-9 1/2 STREET SE
ROCHESTER, MN 55904

TEL-S CORPORATION
11224 WILCREST GREEN DRIVE
HOUSTON, TX 77042

TEL-S CORP. OR DALLAS
P. O. BOX 828
CEDAR HILL, TX 75104

TEXAS PRECISION IMAGE
2101 GOLDEN ROAD
TYLER, TX 75701

THE ARLYN CORP.
208 S. PULASKI STREET
BALTIMORE, MD 21223

THE REX CORP.
1840 N. MICHIGAN
SAGINAW, MI 48602

THE UNION SUN JOURNAL
459 S. TRANSIT STREET
LOCKPORT, NY 14094

TYPE AND TURBINE COMPANY
115 E. RENTON STREET
PHARR, TX 78577

UMICO
405 THOMPSON AVE.
EXCELSIOR SPRINGS, MO 64024

VARI SERV. CO.
626 HILLCREST DRIVE
WESTFIELD, IN 46074

VIKING MICROFILM (3/12/87)
39 SARAH DRIVE
EAST FARMINGDALE, NY 11735

WAYNE BARNES
6226 E. LATIMOR STREET
TULSA, OK 74115

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	NO. C 87 1686 WWS
SERVICE, INC., et al.,)	
)	
Plaintiffs,	)	PLAINTIFFS' FIRST
	)	REQUEST FOR
vs.	)	PRODUCTION OF
	)	DOCUMENTS
EASTMAN KODAK)	
COMPANY,)	
)	
Defendant.)	
_____)	

PLEASE TAKE NOTICE that, pursuant to Rule 34, Federal Rules of Civil Procedure, defendant **EASTMAN KODAK COMPANY** is requested to produce for inspection and copying all documents described herein on or before November 5, 1987 at the Law Offices of James A. Hennefer, 220 Sansome Street, Fourteenth Floor, San Francisco, California 94104.

In responding to this request for production of documents the following definitions and instructions shall be deemed applicable:

DEFINITIONS

The terms listed below will have the meanings indicated unless the context requires otherwise.

1. "**Kodak**" or "**Defendant**" means defendant herein, the Eastman Kodak Company, a New Jersey corporation, and any of its divisions, subsidiaries, directors, officers, servants, agents, employees, or representatives and each of them.

2. "**Plaintiffs**" means the plaintiffs herein, and their partners, directors, officers, servants, agents, employees or representatives, and all or each of them, as the case may be.

3. "**Micrographics Equipment**" means the mechanisms manufactured by Kodak and used for the reduction of information to a microform containing microimages too small to be read without magnification or enhancement, and used for the storage and retrieval of a hard copy of such information, including, but not limited to microfilmers, processors and retrieval and printing devices, both manual and computer-aided systems, and, computer output to microfilm system.

4. "**Photocopy Equipment**" means the mechanisms manufactured by Kodak and used for the reproduction of a hard copy of written or graphic material through a photoconductive process. These include, but are not limited to Kodak Ektaprint models 100, 150, 200, 250, 300 and 350 and related accessories.

5. "**Replacement parts**" means component parts of micrographic or photocopy equipment, as the case may be, for use in the servicing, repair, reconditioning or upgrading of such equipment.

6. **"BISD"** means Kodak's Business Imaging Systems Division which manufactures and markets micrographics equipment and sells replacement parts for such equipment.

7. **"CPD"** means Kodak's Copy Products Division which manufactures, remanufactures and markets photocopy equipment and sells replacement parts for such equipment.

8. **"CESD"** means Kodak's Customer Equipment Services Division which provides after-sale service for Kodak micrographics and photocopy equipment.

9. **"EMA"** means "Equipment Maintenance Agreement" which is Kodak's service contract with owners or lessees of Kodak micrographics or photocopy equipment in which Kodak agrees to service and repair the equipment for a fixed amount of money over a period of time.

10. **"Per-Call"** means Kodak's arrangement for service and repair of micrographics and photocopy equipment in which Kodak charges the owners or lessees of such equipment time and materials for such service and repair.

11. **"ISO"** means "independent service organization", which is an entity not affiliated with Kodak that offers third party service and repair for micrographic and/or photocopy equipment.

12. **"OEM"** means "original equipment manufacturer," which is an entity that produces replacement parts for Kodak, whether that entity originally produced that part for Kodak to use in the assembly of its new micrographic and/or photocopy equipment or not.

13. **"Conversation"** means any oral communication, whether formal or informal, whether face-to-face or by means of telephone or other electronic transmission, occurring at any time or place and under any circumstances whatsoever, in which information of any nature was stated, transmitted, or transferred.

14. **"Document"** means all original writings of any nature whatsoever and any nonidentical copies thereof in Defendant's possession, custody or control, or available to it, regardless of where located, and includes, but is not limited to contracts, agreements, memoranda, tape recordings, letters, correspondence, diary entries, reports, contact sheets, studies, summaries, minutes of board or committee meetings, notes, jottings, bulletins, notices, announcements, instructions, charts, manuals, brochures, schedules, telephone logs, telephone toll records, telegrams, teletypes, results of investigations, licenses, ledgers, books of account, charge slips, receipts, stenographers' notebooks, desk calendars, appointment books, computer data, written communications between, to or among officers or directors, financial calculations, partial or complete reports of telephone or oral conversations, preliminary or final drafts of any of the foregoing, and all other writings or recordings of any kind, regardless of their nature or author. In cases where original and/or nonidentical copies are not available, "document" also means nonidentical copies of original documents and copies of nonidentical copies.

15. **"Meeting"** means any encounter involving two or more persons, whether formal or informal and whether scheduled in advance or accidental.

16. "Concern(s)" or "concerning" includes referring to, alluding to, responding to, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, mentioning, reflection, analyzing, constituting, evidencing or pertaining to.

INSTRUCTIONS

1. Production of Documents In Possession, Custody or Control Required.

In producing these documents, you are requested to furnish all documents known or available to you, regardless of whether these documents are possessed directly by you or your agents, employees, representatives, investigators, or by your attorneys or their agents, employees, representatives or investigators.

2. Documents Must Be Produced In Full.

If any of those documents cannot be produced in full, produce to the extent possible, specifying the reasons for your inability to produce the remainder and stating what information, knowledge, or belief you do have concerning the unproduced portion.

3. Objections to Production Must Be Stated and Documents Not Produced Listed.

If the production of any document herein is objected to on the grounds that such document is a confidential communication protected by the attorney-client privilege, or is protected by the attorney work-product privilege,

furnish a list of all such documents as to which a privilege is claimed so that the Court may make a determination as to whether the privilege claimed is applicable.

4. Lost or Destroyed Documents Must Be Listed.

If any of these documents have for any reason whatsoever been destroyed, lost, or withheld, specify the reason(s) for such withholding, loss or destruction and state what information, knowledge, or belief you do have concerning the lost, destroyed or unproduced documents, including a list of such documents.

5. Production of Originals, Copies, and Photocopies Required.

You are requested to produce all copies and photocopies as well as originals, whether signed or unsigned.

6. Production of Prior Drafts Required

You are requested to produce all prior drafts as well as the final form, of all documents.

You are requested to produce all documents whether or not previously produced for copying and inspection in this litigation.

REQUEST FOR DOCUMENTS

The following requests, unless they specify otherwise, refer to the time period from April 13, 1983 to present. You are requested to produce:

1. All documents concerning Kodak's identification of specific ISO's or other entities to whom it would not sell replacement parts or on whom it would place restrictions on the terms and conditions for the sale of replacement parts. These documents should include without limitation:

- a) The requests within Kodak for Kodak personnel to identify such ISO's or other entities.
- b) The responses to such requests.

2. All documents concerning the policy and operating instructions given to Kodak personnel at Kodak Parts Services for receiving and filling replacement parts orders or for refusing to fill or delaying replacement parts orders. These documents should include, without limitation:

- a) Documents showing the mechanism or the criteria for differentiating between classes of customers including but not limited to ISO's and direct purchasers of Kodak micrographics or photocopy equipment; and,
- b) Documents showing the filling and shipping of orders for the various classes of customers and various types of replacement parts (e.g. normal parts vs. "all time" parts).

3. All annual profit and loss statements showing revenues and costs for:

- a) Sales of new Kodak micrographic and photocopy equipment.
- b) Sales of used or reconditioned Kodak micrographic and photocopying equipment.
- c) Supplies for Kodak micrographic and photocopy equipment.

- d) Replacement parts for Kodak micrographic and photocopy equipment.
- e) Service for Kodak micrographic or photocopy equipment.

4. All documents concerning the sources of replacement parts, including but not limited to identification of parts produced by Kodak and parts produced by OEM's (including identification of each OEM).

5. All documents concerning the acquisition cost to Kodak of replacement parts.

6. All documents concerning contracts or agreements with the following entities concerning the production for Kodak of replacement parts and sale of those parts to entities other than Kodak.

- 1. Merkel Motor Company, Chicago, Illinois
- 2. Bodine Electric Motor Company, Chicago, Illinois
- 3. Acme Electric Company, Rochester, New York
- 4. Barber Colman Company, Rockford, Illinois
- 5. Sylvania Corporation, Danvers, Massachusetts
- 6. Electro Craft Corporation, San Jose, California
- 7. Belting Industries, Kenilworth, New Jersey

7. All documents concerning inventories of replacement parts on hand at Kodak.

8. All documents concerning inventory levels needed to satisfy repair needs for micrographics and photocopy equipment with regard to "Kodak's authorized dealers, distributors, service outlets, Kodak Customer Equipment Services Field Engineers and Equipment Service Centers, Government users and others who purchased equipment directly from Kodak".

9. All documents concerning identification and inventories of, and restrictions on "all time" parts, as the term "all time" was used in a letter dated July 15, 1986, attached as Exhibit 1 to the Declaration of Robert A. Lorensen filed in this action on August 14, 1987.

10. All documents concerning the growth of ISO's, including but not limited to documents identifying the amount of micrographics and photocopy repair business of ISO's the "losses" of such service business by Kodak to ISO's, and market shares of such service.

11. All documents concerning reports from the field of competition from ISO's for Kodak's service of micrographics and photocopy equipment.

12. All documents concerning complaints by owners of Kodak micrographics or photocopy equipment about ISO service.

13. All documents concerning restrictions Kodak places on the resale or use of replacement parts sold to equipment owners who purchased their equipment directly from Kodak.

14. All documents concerning the sale of replacement parts to "service bureaus" who provide contract

micrographics services, to "resellers," or, to "copy shops."

15. All documents concerning the patterns of purchases and/or ownership of Kodak micrographic and photocopy machines including, but not limited to numbers of Kodak machines owned by each entity, and the frequency of new purchases by an existing customer.

16. All documents concerning prices charged, (whether for accounting purposes or actually received) for all micrographics and photocopy replacement parts:

- (a) Used to fulfill EMA's;
- (b) Used on a "per-call" basis;
- (c) Sold to third parties for their own use.

17. All documents concerning the prices charged by Kodak for EMA's for micrographics and photocopy equipment.

18. All documents concerning the trade-in policy and practice of Kodak for its own or other brands of micrographics and photocopy equipment.

19. All documents concerning the number of pieces of equipment, trade-in value, and use of actual trade-in micrographics and photocopy machines received by Kodak.

20. All documents concerning charges made for inspection and repair of micrographics and photocopy repair equipment, which was formerly serviced by Kodak, under the policies set out in Exhibits 7 and 8 to the Declaration of Michael J. Murray and in Exhibit 1 to

the Declaration of Emmett A. Gross, both filed in this action on August 14, 1987.

21. All documents concerning the useful life, or the actual average or expected length of ownership for micrographics and photocopy equipment.

22. All documents specifically naming plaintiffs, or any of them, which concern their businesses in competition with defendant.

Dated: September 25, 1987

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICES, INC., et al.,)	
Plaintiffs,	)	No. C 87 1686 WWS
	)	ORDER
v.)	
EASTMAN KODAK)	
COMPANY,)	
Defendant.)	

A conference was held in this matter by telephone on December 21, 1987 at 3:30 p.m., at which time counsel for the parties were heard regarding possible further discovery necessary for the plaintiffs to respond to defendant Eastman Kodak Company's pending motion for summary judgment. Having heard the arguments of the parties and good cause appearing therefor, the Court hereby ORDERS:

1. The revised briefing schedule on defendant's motion for summary judgment shall be as follows:

a. Plaintiffs shall file their response to defendant's motion on or before January 29, 1988;

b. Defendant shall file its reply brief on or before February 12, 1988;

c. The hearing will take place on February 26, 1988, at 11:00 a.m.

2. Without altering the above-described briefing schedule, plaintiffs shall be given the opportunity to take the depositions of no more than two additional deponents who can provide testimony regarding the issue of market power raised in defendant's motion for summary judgment.

3. Without altering the above-described briefing schedule, defendant will, upon specific requests by plaintiffs, provide plaintiffs with the source, author and/or date, if ascertainable, of any documents already produced to plaintiffs by defendant.

4. In connection with their response to defendant's motion for summary judgment, plaintiffs may move this Court, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, for the opportunity to obtain further discovery relevant to the issues raised by and material to defendant's summary judgment motion. Any request for additional discovery should be accompanied by an explanation of the relevance of the requested information to the issues raised by and material to defendant's motion for summary judgment.

IT IS SO ORDERED.

Dated: 1/4/87

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

Approved as to form:

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	NO. C 87 1686 WWS
SERVICE, INC., et al.,)	
Plaintiffs,)	
vs.)	
EASTMAN KODAK)	
COMPANY,)	
Defendant.)	

PLAINTIFFS' MEMORANDUM OF POINTS
 AND AUTHORITIES IN OPPOSITION
 TO DEFENDANT KODAK'S
 MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Eastman Kodak Company's ("Kodak's") Motion for Summary Judgment is based upon: (1) The ignoring of the relevant material facts and the statement of half-truths; (2) economic theory that is flawed, unprecedented and has no basis in financial reality; and (3) legal theories that are incorrect as a matter of law.

I. Factual Inaccuracies

A. Kodak's "Policies/Practices" Are Different From those Stated, In Intent Application And Competitive Effect

Kodak's restrictive parts policy (and the application, practice and enforcement of that policy) is truly a wolf in sheep's clothing. The policy is not one designed (as Kodak contends) to sell parts "only to direct Kodak equipment customers" but in practice is one designed *not* to allow the sale of any parts (directly or indirectly) to its service competitors as a means of driving them out of business. Kodak has sold, and does sell most Kodak micrographics parts to *anyone*, without restrictions, except those identified as "BENU'S" ("Business Equipment Non-Users" – a Kodak acronym directly equated with Kodak independent service competitors ("ISOs")). Kodak has instituted "tiger teams" to ferret out BENUs. BENU's parts are then severely restricted (as to older equipment parts), or totally cut off (as to newer and "all time" equipment parts). As to Kodak photocopy parts, Kodak's practice (which was different from its stated policy) was to cut off sales of parts to service competitors altogether in 1985. Kodak, in addition, has used threats of termination of parts to "direct Kodak equipment customers" or others who resell parts to Kodak service competitors or who compete in photocopy service with Kodak. Kodak has leveled slanderous allegations of ISO's stealing parts and dealing in "stolen" parts, and has used Kodak's "security" forces to illegally confiscate parts – all in an attempt to prevent these parts from getting to their competitors. In a word, Kodak's parts policy is *predatory* –

predatory against any service competitor. It is not a unilateral internal profit and loss business decision on how to resell parts by Kodak.

B. Kodak Micrographics and Photocopy Machine Owners Are Locked In

Kodak's repeated statements that with "interbrand" competition "Kodak equipment buyers" could switch to other manufacturers' products is grossly misleading. The relevant question is actually whether Kodak equipment owners, with large capital investments, low residual equipment prices, and high costs in switching microfilm, applications software and other costs associated with a change of ownership, can, as a practical matter, switch brands when faced with supra-competitive prices or conditions on Kodak service.

Kodak's simplistic analysis that a micrographics user has the "option to employ hard copy" or would spend hundreds of thousands or even millions of dollars in reprocessing its data, redeveloping its software, purchasing new equipment and retraining its operators in order to avoid supra-competitive pricing for Kodak service is totally unrealistic. Likewise, to say that a Kodak Ektaprint copier owner who has, for example, invested \$75,000 in a copier within the last five years and the residual value of that equipment on the open market is \$2500 may "easily thwart any such attempt (to extract monopoly profits) by switching to Xerox, IBM, Cannon, Bell and Howell, 3M or some other manufacturer's equipment" where Kodak service costs are \$2,000 to \$3,000 per

year above a competitive level is, again, totally unrealistic.

As a practical matter these owners of Kodak equipment, through Kodak's carefully designed, maliciously implemented anti-competitive policies are locked into ownership of Kodak machines.

C. Kodak Is Attempting To Be A "Free Rider", Not Kodak Service ISO's

Kodak's repeated allegations that ISOs are "free riders", could not be further from the facts. ISOs do "bear all of the associated expenses" for obtaining parts. Kodak, in about 90% of its parts merely buys parts from its parts suppliers and passes all of its costs (and a healthy profit) on to ISOs.

The parts business for Kodak is a very profitable one. ISOs often pay Kodak *double* what other wholesalers (when they can also obtain these parts from Kodak's suppliers) sell these parts for. ISOs are charged double the internal charge to Kodak equipment service representatives ("ESR's") for the same parts. ISOs carry inventory of parts portionally larger than Kodak's, (one ISO is turning its parts every three years, whereas Kodak turns its parts every sixty days). Under Kodak's new "policy" ISO's pay an additional 10% premium on all parts. The expense to Kodak of ferreting out "BENU's" has greatly exceeded any imaginary savings from parts demands - and in the process exposed Kodak's anti-competitive intent.

D. Kodak's Prices For Micrographics and Photocopy Service Are Not Competitive

Kodak's factual allegation that "interbrand" competition prevents "monopoly profits" in Kodak micrographics and photocopy service simply does not comport with reality. In micrographics, for example, Plaintiff Image Technical Services ("ITS") is providing service for approximately \$100,000 (at a profit in excess of 50%) for a customer which Kodak had charged over \$200,000. (The customer, a health claims processor Computer Science Corporation ("CSC"), is "locked in" to an expensive hardware/software Kodak micrographic system with over 100 pieces of equipment.)

In the photocopy area a standard Kodak EMA for an Ektaprint 150 AF copier sold for \$28,968 per annum. An equivalent contract, for the Xerox 1075 cost approximately \$9,800 per annum. Kodak can maintain these monopoly profits servicing its own equipment only so long as there are no ISO competitors. The development of large numbers of Kodak micrographics service competitors in the early 1980's and the onset of Kodak photocopy service competitors is precisely what Kodak, in the last two years, by its current policies and vicious enforcement practices, intends to destroy. Kodak representatives have so stated.

E. Anti-Competitive Effects Of Kodak's Challenged Business Practices

Kodak's statement that "Kodak's challenged business practices could not have had any anti-competitive effects

on Kodak's or Plaintiff's customers," is simply absurd. The monopoly profits Kodak had exacted for inferior service at CSC, before the competition of ITS, are but one example of how a machine *owner* will choose to pay supra-competitive prices for Kodak service without ISOs' competition. Consumers of service (Kodak equipment *owners*) will inevitably be harmed by the limited choice of service providers (as ISOs are destroyed) because they are denied the opportunity to contract for lower prices, and to bargain for better service. Kodak will be able to derive, again, supra-competitive prices. Its service profits will be limited only by the cost of switching equipment, data applications, software and operators for equipment owners, which, in proportion to the cost of service, is astronomically high.

II. Economic Flaws

A. Kodak's "Market" Theory Is Economically Unviable and Unprecedented

Kodak's novel and unprecedented economic theory is that the "market" should be defined by everything that a defendant does. It glibly states, without proof, that "as far as Kodak is concerned, it does not compete in any service markets" but that "service is simply a part" of its business of manufacturing copiers and imagining equipment. This strange assertion leads to several conclusions contrary to economic reality.

First, this would mean that there is a different product market depending upon who the defendant is, and what that defendant does – even where different defendants manufacture the same type of equipment.

Second, it would mean that Kodak *does not* compete with the plaintiff ISOs but that the plaintiff ISOs *do* compete with Kodak. It is absolutely clear that Kodak competes directly with plaintiff ISOs. Plaintiff ISOs, particularly in the micrographics area, where parts supplies have, in the past, been more readily available (and in which market there are more ISOs), directly constrain Kodak's ability to obtain supra-competitive prices for their service. Where ISOs have developed in Kodak copiers, this is true also.

Third, Kodak's interbrand market theory simply ignores the fact of the choices which, in reality, confront an equipment owner. There are two tiers to the market. One tier at which Kodak can compete for the prospective purchasers of new units and systems with other manufacturers, while at the second tier, Kodak can destroy its competitors in the service market - to wit, ISOs like plaintiffs. Consumers, realistically, usually choose not to replace their equipment and not to avail themselves of the "interbrand competition" where the supra-competitive price at the second or service tier is disproportionately small to the losses they would incur in replacing their equipment.

B. Kodak As A Manufacturer Is Not Economically Entitled To All Profit From All Associated Aftermarkets

Kodak's second unprecedented and novel, but flawed, theory of economics is that a manufacturer of equipment is entitled to reap monopoly profits on all

lines of business related to its natural monopoly in equipment manufacture.

That an efficient manufacturer of equipment somehow has some divine right to reap profits from an inefficiently run replacement parts business or inefficient servicing of that equipment is novel indeed. Kodak, not the ISOs it threatens to put out of business by its policies in this action, is the culprit promoting Kodak's oft-relied-upon spectre of "Japanese competition." Inefficient, high-priced, lower quality service, which has often occurred on Kodak equipment without the competition of plaintiff ISOs, will do more to promote the demise of American industry than the stiff competition of small, independent service organizations like plaintiffs.

III. Legal Flaws

A. The Service Market For Kodak Equipment May Exist As a Matter of Law

There are scores of disputed facts about the market, as set out herein. Kodak is thereby forced: 1) either to avoid the obvious market of service for Kodak equipment; or, alternatively, 2) to contend that it does not exist as a matter of law. This argument ignores the black letter anti-trust law that market determination is "fact specific." It ignores cases factually similar to this where it was held that the service of Bell & Howell micrographics equipment was a relevant market, and that the service of IBM systems was a relevant market. *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986) modified 810 F.2d 1519 (1987); *C.E. Services v. Control Data Corp.*, 759 F.2d 1241 (5th Cir. 1985).

B. Kodak Has Market Power In The Service Markets

Solely by defining the markets as "interbrand" markets for all "imaging" or "copying" functions, Kodak arrives at the conclusion that it has no "market power" in the relevant markets. A correct definition of the "markets" as the markets for Kodak micrographics service and Kodak photocopy service disposes of Kodak's assertion of the lack of "market power." Kodak has over 80% of the Kodak micrographics service and over 95% of the Ektaprint copier service in the United States. The black letter anti-trust law definition of market power is: (1) the ability to raise prices; and (2) the ability to exclude competitors. The facts show, and Kodak's own documents admit, that ISOs can service Kodak micrographics equipment often for 50% of the supra-competitive prices Kodak can obtain without ISO's competition. In photocopy service, Kodak has been able to charge up to the *triple* competitive rates without ISOs' competition. Kodak has the power to raise prices.

Kodak has successfully been able to charge such supra-competitive prices by restriction of its parts. It has already prevented ISO's in the Kodak photocopy market from developing, and has restricted and even driven some ISO competitors in Kodak micrographics service out of business. Kodak has the ability to exclude competitors.

C. This Is Not A Simple "Dealer Termination" Case As In Calculators Hawaii Or Bushie

Kodak's attempts to stretch the decisions in *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972) and

Calculators Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1332 (9th Cir. 1983), (which were simple dealer termination/substitution cases) to cover this case where Kodak has, with predatory intent and anti-competitive effects, sought to destroy all competition in a national market, are far off the mark.

The action with regard to the local dealership in *Calculators Hawaii*, unlike Kodak's policy here, did not evidence an intent to monopolize and was not intentionally predatory. Exactly the opposite is the case with Kodak's nation-wide and industry-wide policy to restrict all competition in the Kodak service industry, its stated intent to control this entire service industry, and its predatory practices. *Calculators Hawaii*, likewise did not involve large and expensive pieces of equipment and computer applications to which customers are "locked in," as here, so that interbrand competition was a viable theory.

In *Bushie*, plaintiff failed to allege or show how the active interbrand equipment competition "did not restrict the exercise of monopoly power in servicing of Stenocord machines." This is not the case here, where a "lock in" of Kodak customers is a factual issue, and where a showing has been made that it is not financially feasible for existing owners of Kodak machines to switch machines to "interbrand" competitors if Kodak's service prices are supra-competitive. *Digidyne Corp. v. Data General Corp.* 734 F.2d 1336, 1342 (9th Cir. 1984). The *Dimidowich v. Bell and Howell*, *supra* case also does not support Kodak's case, but rather reinforces plaintiffs' case for a "service" market, the Ninth Circuit having recognized just such a market in that case.

D. There is "Competitive Injury" under Aspen

Kodak's argument that there is no "competitive injury" to the service market, in terms of the standard set out in *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 105 S.Ct. 2847, 2859 (1955) is clearly wrong when reference is made to the facts in this case. By the standard in *Aspen*, there are clearly questions of fact as to whether there is detriment to the consumers of service for Kodak machines in terms of price, quality and availability of the product at issue.

E. Kodak Service And New Machine Purchases Are Both Tied To Parts

Plaintiffs' tie-in theories, which are supported by the facts, include: (1) that the purchasing of Kodak service is tied to Kodak parts, over which parts Kodak has developed a monopoly with its suppliers; and (2) that new Kodak micrographics or photocopy machines bought directly from Kodak, and not through a broker or a user, are tied to Kodak parts.

Under the "separate products" test of *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551 (1984), replacement parts, service and new equipment each constitute separate products. Kodak has over 99% of the Kodak replacement parts market, and can, and does, maintain supra-competitive prices for these parts. Where many Kodak micrographics and photocopy equipment users would otherwise employ ISO service, the lack of replacement parts available to ISOs has prevented them

from doing so. Where many prospective Kodak customers would purchase used equipment from Kodak brokers, the inability to get parts and service for such equipment has prevented them from doing so. The amount of business lost by Plaintiff ISOs and impacted by the ties is substantial.

F. Kodak Parts Providers/Service Bureaus/Brokers/Self-Servicers: "Group Boycott" Of ISOs

Kodak has both explicitly and implicitly made agreements with parts suppliers and with those entities outside Kodak to whom it supplies replacement parts that these parts cannot be sold to Kodak ISOs, and that those entities will not compete with Kodak on service. In no uncertain terms, Kodak and this group of Kodak suppliers and customers refuse to deal with ISOs, largely refusing to sell them parts *at any price*. It is clear that the purpose-related factors and horizontal agreement to foreclose competitors requires applying a per se rule to this concerted refusal to deal. The "anti-competitive motive" of Kodak in preventing independent service organizations from acquiring parts is plain. *Klor's Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

G. The Dimidowich "Hydrid" Conspiracy

Kodak is selling replacement parts to "service bureaus," which are micrographics organizations who microfilm and store records for third parties. Kodak also sells replacement parts to self-services. These service bureaus offer service for Kodak micrographics equipment

to their customers, such as banks with branch offices who have reader/printers or other retrieval devices. They are also users and sellers of Kodak film and supplies.

Kodak's policy against selling newer micrographics' parts to ISOs, its limitation on "all time" parts for older micrographics' equipment and its restrictions on the sale of parts for older micrographics' equipment to ISOs, prevents these service bureaus and self-servicers from reselling and making these parts available to ISOs. Those who do are terminated by Kodak. Both Kodak and these parts customers are aware of their joint refusals to deal with ISOs. Based upon these facts, a "hybrid" conspiracy by Kodak with such service bureaus and self-servicers is shown and a violation of the antitrust laws exists. *Dimidowich v. Bell & Howell, supra.*

STATEMENT OF FACTS

I. The History of Kodak's Parts Supply And Third-Party Service.

A. Kodak's Policy on Replacement Parts.

Kodak's written parts policy through 1985, was stated to its customers in the CESD Replacement Parts Principles which stated that:

Kodak will sell replacements parts to any party who intends to use them to repair Kodak equipment.

The clear meaning of this was that Kodak sold parts to *anyone* using them to repair Kodak machines, including independent service organizations.

Kodak admits that, with regard to micrographics' parts, there were no restrictions on the sale of parts to ISOs until the restriction on new parts announced in the April 12, 1985 memo (Exhibit 1, Gross Declaration). Kodak also sold photocopy parts to ISOs servicing Kodak Ektaprint photocopy machines. Paul Hernandez, President of ITS specifically called Kodak CESD Parts Services prior to entering the business, and requested advice on whether they would sell him parts for this purpose. He was advised they would. Thereafter he purchased such parts freely. Kodak has produced no written communication to customers evidencing a refusal to sell copier parts prior to 1985.

Other customers for Kodak parts, in addition to ITS, relied on Kodak statements, its Parts Principles, its Terms of Sale, and its longstanding practice of selling parts to "any party who intends to use them to repair Kodak equipment." ISOs began setting up businesses for the micrographics area, primarily, and then in the photocopy area, in reliance on this in the early and mid-1980's.

B. The Development Of Micrographics and Photocopy ISOs for Kodak Machines.

The development of independent service organizations servicing Kodak micrographics and photocopy equipment is a relatively new phenomenon. Independent service organizations had begun to compete directly against Kodak, increasing numbers in 1984 and in 1985. Prior to 1982 Kodak had serviced almost 100% of their own micrographics machines. Of the 16 plaintiffs in this action who service micrographics equipment, 12 of them

came into existence in the 1982 period or later. These ISOs began competing head-to-head with Kodak both for private and public sector contracts, posing a threat of increased competition, and, cutting Kodak's supra-competitive prices by up to 50% (Dec. Damiani ¶ 5; Dec. Hernandez, ¶¶ 9,12; Dec. Tamvacakis, ¶¶ 12,18) In the area of photocopy parts, two months after ITS was awarded State contracts in the bid process against Kodak, for the first time, parts' orders were refused. (Dec. Hernandez ¶¶ 15-17, 19-22) Because of the direct competition of ISOs, as stated by Tim Gross of CESD, ISO's service became a "concern" "relevant to both BISD and CESD performance in 1985." (Gross Declaration, Exhibit 1) Kodak's anti-competitive actions alleged by plaintiffs, first with the purpose to slow this growth (1985), and, then with the purpose to put ISOs out of business and out of competition with Kodak (1986), were in direct response to this development of ISOs and the challenging of Kodak's supra-competitive prices.

The brokerage of Kodak Ektaprint photocopiers is also a relatively new phenomenon. The leader in the industry, Ronald Lydick and Equipment Brokers Unlimited began business in 1982. Other such brokers, including CPO, Ltd., and International Business Equipment began business in 1985 and 1986, respectively. In response to the brokers' head-to-head competition with Kodak in an increasing number of situations in 1986, Kodak's Copy Products Division stated that Kodak would take action to put them out of the Kodak business. (Dec. Varing, ¶¶ 5-7) Subsequent actions by the Copy Products Division, like those in BISD and CESD were taken in response to competition which affected their "financial performance,"

and prevented supra-competitive prices from being realized.

C. Development of the ISO/Broker Businesses

1. Development of ISOs in Kodak Micrographics Competing With Kodak On Price and Quality.

Of the 18 plaintiffs, 16 are involved in the servicing of Kodak micrographics equipment. These service organizations are staffed largely by experienced, quality Kodak-trained technicians, (Dec. Damiani ¶¶ 5,7,13; Dec. Welch ¶ 2; Dec. Hernandez ¶¶ 3-5,17; Dec. Tamvacakis, ¶¶ 4,5) who continue to update their training. (Dec. Damiani ¶ 13; Dec. Hernandez ¶ 5;) contrary to Kodak's assertion, many ISOs maintain their own large inventories of parts. In fact, the inventory of B.C.S. Technical Services is greater than Kodak's in terms of parts turnover versus inventory. (Dec. Welch ¶ 19). The ISOs, in order to compete against the "Kodak" name, had to provide micrographics services at a higher quality and lower price.¹

¹ An example of the specific quality service improvement which micrographics dealers provided over Kodak service is the service provided by ITS to computer Science Corporation ("CSC") in Sacramento, California. Three of CSC's machines that had been down for six months under Kodak's service were back in service in about two weeks under ITS's service. (Dec. Hernandez ¶¶ 42-46)

(Continued on following page)

(Dec. Damiani ¶ 5; Dec. Hernandez ¶¶ 9, 48-54; Dec. Welch, ¶¶ 23-25; Dec. Searle ¶ 7)²

2. The Development Of Kodak Ektaprint Copier ISOs and Brokers

Kodak's entry into the copier-duplicator market with the Kodak Ektaprint machine line is of recent origin, in 1975. The total population of Kodak Ektaprint copy machines, unlike Kodak micrographics machines in existence was small until the 1980's.

As a result, the demand for independent service of Kodak Ektaprint machines, and therefore the advent of Kodak Ektaprint ISO's service developed more slowly and at a later date. In fact, the number of ISOs actively servicing Kodak Ektaprint copiers around the United States is now still fewer than ten. (Dec. Varing ¶ 4) As in the micrographics industry, the new Kodak Ektaprint ISOs had to compete both on quality and price of service.

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Another graphic example with regard to the competition ISOs give Kodak's supra-competitive prices is the CSC contract. Prior to competition by ITS against Kodak for the CSC account, Kodak was receiving over \$200,000 per annum for servicing CSC's equipment. ITS, undertook to service the CSC account for just over \$100,000, a reduction of 50%. (Dec. Hernandez ¶¶ 48-52)

² The CSC situation is a graphic example of both price and service. ITS gave CSC a \$100,000 contract where Kodak was \$200,000, and a full time, top technician where Kodak's was part time and left machines broken. (Dec. Hernandez ¶¶ 42-46, 48-52)

Again, they found that Kodak was obtaining supra-competitive prices for substantially lower quality service than ISOs were willing to offer.³

The independent brokering of Kodak Ektaprint copiers is likewise a new phenomenon. It consists of either brokering equipment "as is," or purchasing that equipment, reconditioning it and reselling it. There are only about six such brokers in the United States. These brokers, however, actively compete with Kodak head to head for the sale of units into account which want Kodak Ektaprint copiers. (Dec. Varing ¶ 16)

II. Kodak Micrographics and Kodak Ektaprint Copier Owners Are "Locked In" Vis-a-Vis Service

Due to a number of factors in each of the service markets, Kodak equipment owners, facing supra-competitive service charges and the tying of service and new machines to Kodak parts do not, as a practical matter, and cannot, as a matter of "economic feasibility," change their equipment to an "interbrand" competitor of Kodak's. These factors include: 1) the large capital expenditures in

³ When ITS entered into bidding head-to-head with Kodak for the State of California contracts for the Mental Health Department and for the Department of Transportation, the yearly maintenance costs for these Ektaprint machines were reduced to less than 1/3 of Kodak's EMA list price. Additionally, the State of California agencies experienced an improvement in service and the response time of service. ITS was cleared to bid on additional state contracts as a result of its quality service and price, and received additional contracts from the Department of Finance and Department of Health Services. (Dec. Hernandez, ¶¶ 20,24)

equipment; 2) the low residual equipment prices (fostered by Kodak); 3) the high cost associated with switching formats of microfilm and records (e.g. Miracode and Oracle microfilm); 4) the high cost of redoing applications software (e.g. CSC); 5) the difficulties created by Kodak in obtaining service and reconditioning for their used equipment; and, 6) the cost associated with new training of operators and adapting to a different brand.

A. The Lock-In Of Kodak Micrographics Equipment Owners.

In the area of micrographics, Kodak customers, whether employing older systems such as the Kodak Miracode or Oracle computer aided systems, or newer systems, cannot, as a matter of economic feasibility, readily "junk" their Kodak equipment because of supra-competitive prices in service. This is becoming increasingly so with newer, some sophisticated equipment because of the complexity of applications and the software which links various functions in the micrographics area.

In old systems, such as the Kodak Miracode, where there are large amounts of microfilm of old records, the systems must be maintained unless the cost is absolutely prohibitive, or all of the old microfilm (which is not frequently used) must be changed to new formats at substantial expense. (Dec. Kastner ¶ 6.; Dec. Welch ¶¶ 17-18)

The same is the case with the more recent Oracle terminal. Microfilm, which may, as in the case of Super Value Stores in Minnesota, contain several years of back

invoices, or as in the case of the Sacramento County Sheriff's office, contain warrants and arrest records for years, must, as a matter of economic feasibility, be serviced, or the owner spends tens of thousands of dollars to convert all of its records to a new machine. (Dec. Kastner ¶¶ 7,8; Dec. Hernandez ¶¶ 39, 40, 41, 42-47)

This "lock-in" is increased by a number of other factors as to old equipment. Because Kodak refuses to service very old equipment, there is often a very low residual value to the equipment. Recoupment of any portion of the high initial capital cost is difficult. Without ISO's, and no service at all from Kodak, the effect of the lock-in would be magnified. Because of the age and limited use of the records for a Miracode or Oracle system, payment by a consumer of large amounts to upgrade the records to newer equipment is less financially feasible. Where service is available on these machines, Kodak may require an EMA. Even if per call service were available, the customer must endure Kodak's "mandatory wait" of up to three days for per call service. (Dec. Welch ¶ 23; Dec. of Kastner ¶ 7)

As to newer equipment, such as that in the sophisticated application of CSC in Sacramento, California, the lock-in becomes even more pronounced. CSC has over 100 pieces of Kodak micrographics equipment. Its operations are similar to large Kodak micrographics systems in operation in Blue Cross/Blue Shield, insurance companies, banks, and other large financial institutions in many states.

The system at CSC includes a combination of micrographics machines, and of computer output hardware

and software tailored specifically to CSC's needs. Trading its entire equipment for an "interbrand" competitor of Kodak, due to supra-competitive prices, it would be financially unfeasible for CSC. The special software would have to be retailored at a cost of several hundred thousand dollars. Data would have to be reformatted, and operators would have to be retrained, again, at a cost of hundreds of thousands of dollars. Finally, because the residual value of CSC's Kodak equipment (which is still perfectly functional and well within its useful life) is so low on the used market, the net cost of purchasing new equipment less the residual value of CSC's existing equipment, would be in excess of \$1.5 million. In short, CSC could, and *did*, pay supra-competitive prices of almost \$100,000 more per year for service for this equipment, without considering changing to Kodak's alleged "interbrand" competitors. (Dec. Hernandez ¶ 50; Hennefer, Exhibit C)

B. The Lock In Of Kodak Ektaprint Photocopy Owners

Owners of Ektaprint photocopy machines are not subject to all of the complex forms of "lock in" that sophisticated micrographics systems such as CSC's involve, but some of the same factors apply. The useful life of Kodak Ektaprint photocopiers is generally regarded as 14 years (7 years automatic availability for an EMA, plus 7 years of an EMA with yearly inspections). The cost of a piece of Ektaprint photocopy equipment, however, is generally considerably more than most micrographics equipment. For example, a Kodak 150AF

copier (one of the cheaper models) costs approximately \$75,000 new. In two to three years, or the expiration of 20% of its useful life, the value of the copier will have depreciated down to \$2,500 to \$3,500. (Dec. Hernandez ¶ 56; Dec. Arnold ¶¶ 6-7; Dec. Varing ¶¶ 16-17, 20)

A copy shop will have several of these \$75,000+ machines. Even with supra-competitive prices for Kodak Ektaprint service that were \$2,000-\$3,000 or more above a competitive market level, it is economically totally unrealistic and unfeasible that a Kodak Ektaprint owner would avail themselves of Kodak's alleged "interbrand" switching with regard to that equipment. The owner is locked into the Kodak Ektaprint machines he owns. Kodak's own actions, in progressively restricting the availability of Kodak service and reconditioning for brokered machines, has greatly increased the effect of this "lock in" by depressing the price of used Kodak photocopy machines. Examples of this are the high "pre-installation inspection fees" (which bear no relationship to Kodak's costs), the stated Kodak policy and Kodak practice to make reconditioning as expensive as possible, and the "discretionary" ability to refuse to recondition and service used machines that are brokered.

C. Kodak's Depressing Of The Used Ektaprint Copier Market

The used Ektaprint copier market is a new phenomenon. Kodak has not changed the basic Ektaprint copy machine since the Ektaprint 150 came out in about 1976. (These can be remanufactured into the more sophisticated 200s, 225, 235s and 300s, which Kodak does). As a result a

substantial market has developed for reconditioning and brokering these machines, which market competes with Kodak's new machine sales.

Because of the lack of Ektaprint ISOs, Kodak service for these used machines is often essential to a sale. Without Kodak service, or, with unreasonable costs for such service, the brokerage and reconditioning market for Ektaprint machines is unviable. Kodak, first through its "pre-installation inspection fee," (which was first initiated in 1985 and then increased up to five fold in 1987) then by its stated policy and practice to charge as much as possible for reconditioning, then by its refusal of per call service, and finally, by its discretionary refusal to recondition or service at all (often *without regard for the condition of the equipment*), has made it extremely difficult to purchase and sell used Kodak Ektaprint copiers. As a result, the price of Kodak copiers on the used market has been drastically reduced, in some cases to one-quarter of its prior value. (Dec. Varing ¶¶ 16, 17; Dec. Arnold 8)

These restrictions were instituted by Kodak without regard to whether or not the Ektaprint photocopy machine was on a Kodak EMA (and presumably in top "Kodak" condition), but were based solely on whether the machine was brokered by a third party. Likewise, the useful life of a reconditioned machine, if sold by Kodak, was guaranteed by Kodak, whereas the *very same* reconditioned machine, if acquired by a broker from Kodak in exchange for a brokered machine, would have no guaranteed useful life. Kodak, to discourage further the ability to sell used machines through brokers, and to depress the price of the brokered equipment market, offered trade-ins many times the going market rate. These tremendous

restraints, purposefully imposed by Kodak, further served to "lock in" equipment owners who wished to deal with brands other than Kodak.

III. Kodak's Changes In Policies and Practices in 1985 and 1986.

A. Kodak's Micrographics Policy Changes

1. The April 12, 1985 Micrographics Policy Change.

Kodak had sold all micrographics parts to all servicers, including Kodak ISOs prior to 1985. In response to the growing Kodak micrographics ISO competition, Kodak initiated the policy set out in the April 12, 1985 memorandum of E.A. Gross and J.A. Lacy (Dec. Gross, Exhibit 1). Under this policy Kodak cut off parts on new products to Kodak micrographics ISOs. The effect of this, of course, was that as customers of Kodak micrographics ISOs obtained new equipment, the ISOs were unable to service the equipment for that customer, and, service for these customers was lost by the Kodak ISOs. Additionally, as equipment became obsolete, and the equipment population became all "new equipment" (post April 1985 models), Kodak micrographics ISOs would be able to service no equipment at all. (Dec. Damiani ¶¶ 23, 24; Dec. Welch ¶¶ 8,22; Dec. Kastner ¶ 8; Dec. Searle ¶¶ 4,12,13)

2. The July 1986 O'Brien Letter.

On July 15, 1986 (and on a continuous basis thereafter as new ISOs were identified) Kodak sent out to micrographics equipment competitors a letter from Joseph O'Brien, setting out its new policy for supply of Kodak

micrographics parts to Kodak micrographics service competitors. (Dec. Lorensen, Exhibit 1). The substance of the letter stated: 1) parts would only be sold to competitors who "previously and regularly" purchased parts for the same equipment model (although Kodak had no way of determining this); 2) that orders would not be filled from inventory but consolidated and would be subject to an "anticipated lead time" of "90 days or more"; 3) that parts purchased by Kodak on an "all time" order basis (parts which do not regularly wear out) would not be sold to competitors at all; 4) that no rush orders would be available to competitors; and 5) that the normal 10% discount for non-rush orders would not be available to competitors.

Kodak referred to its competitors as "outside entities who did not purchase equipment directly from Kodak" a term for which the Kodak acronym "BENU" (Business Equipment Non-User) was dubbed. Kodak documents equate BENU directly with service competitors. Kodak attempts to ferret out BENU's and to internally control the supply of parts to them included the formation of a "tiger team" to search out (and destroy) BENU's through Kodak's parts policy, and, the determination of critical operational parts and the delay or not selling of these to BENUs (Kodak Documents Nos. 81 and 82). Statements by Kodak's personnel, including the head of Kodak micrographics "BISD", John A. Lacy, indicate a clear intent to destroy Kodak's micrographics service competitors. (Kodak Documents Nos. 81, 82 and 834; Dec. Damiani ¶¶ 15,22; Dec. Hernandez ¶ 54).

Kodak, while identifying BENUs, and severely restricting or cutting off their parts, sold parts to others

across the country – so long as they were not identified as a Kodak service competitor ("BENU"). Parts were sold to: 1) self-servicers; 2) Kodak brokers; 3) service bureaus (who performed micrographic services for third parties – but who had never purchased micrographics equipment directly from Kodak); 4) to equipment users such as financial institutions (who had never purchased equipment from Kodak); and 5) to total strangers to Kodak with no association to micrographics machines at all (such as the "China Hutch," an English China Shop, or non-existent individuals such as "Remy Corgi," a person's dog). (Dec. Searle ¶¶ 10, 11; Dec. of Tamvacakis ¶ 9.5).

Parts orders, normally available to Kodak competitors on overnight or one day basis for "rush orders", and 14 days, for "non-rush" orders, were all delayed from an average of 30 to 50 days or longer. These delays had nothing to do with parts inventories, since time and again non-competitors of Kodak (who did not even own micrographics equipment), on precisely parallel orders (same part, same day, same geographical area) placed by plaintiffs through non-BENUs received overnight service on parts as to which plaintiffs were told Kodak was "back ordered" or "out of stock". (Dec. Searle ¶ 9.1; Dec. Tamvacakis ¶¶ 9.2, 9.3; Dec. Kastner ¶¶ 10, 11). Parts that were represented to Kodak ISO competitors as "all time" parts were also denied to plaintiffs but sold to total strangers to Kodak because they were not identified as Kodak service competitors (Dec. Tamvacakis ¶ 9.1).

As to the persons to whom Kodak sold parts, such parts were sold only so long as those parts were not resold to Kodak competitors. When it was discovered Butler Office Systems had purchased parts on behalf of

plaintiff Atlanta General, Butler's parts were cut-off. Parts continue to be sold to service bureaus, such as Dataplex, who also offer third party micrographics service, but as to whom Kodak had a substantial financial interest in selling supplies and equipment. Because of the implied threat of cut-off, such service bureaus will not, and do not openly sell parts to Kodak ISO competitors.

B. Changes In Kodak's Photocopy Practice

Kodak claims that, despite its "Terms of Sale" that committed it to selling *all* parts to "any party who intends to use them to repair Kodak equipment," it would not and did not ("knowingly") sell parts for its photocopy machines to Kodak Ektaprint service competitors. This is not true. Paul Hernandez at Image Technical Service inquired of Kodak's CESD and was told he could purchase parts for the repair of Kodak Ektaprint copiers, and did so. Only after ITS competed head-to-head with Kodak, and the competition began to impact Kodak, did Kodak attempt to institute a detailed plan to cut-off parts to photocopy service competitors. This occurred in June, 1985, immediately after ITS's successful bids on State of California Ektaprint service, and just before the July 1, 1985 beginning of those contracts with the State of California.

Kodak admits, and the documents show, that Kodak has continued to sell parts to "self servicers" of Kodak Ektaprint machines - those who service their own machines. Kodak's sale of such parts to, for example, the Top Copy in Boston, Massachusetts are expressly conditioned on their not reselling these parts to Kodak

Ektaprint ISO service competitors, or going into Kodak Ektaprint service themselves. (Dep. Gleason pp.71-76; Kodak Doc. No. 000002930). The touchstone of whether Kodak would sell parts was not whether the purchaser had equipment purchased from Kodak, but whether the parts were to be used by Kodak ISO service competitors. (Dec. Hernandez ¶¶ 25-27 and 59).

In addition, as to parts already in the marketplace, Kodak instituted a malicious campaign to prevent Kodak Ektaprint ISO service competitors and reconditioners from obtaining such parts. Detailed searches were made for how ITS was obtaining parts. Paul Hernandez, a former Kodak service representative with an excellent record and top technical skills, was accused of ordering and stealing parts prior to his departure from Kodak. People in the industry were told that Mr. Hernandez was buying "stolen" Kodak Ektaprint copy parts that had been stolen by other Kodak service representatives. The statements were not true. (Dec. Hernandez ¶ 59; Kodak Docs. 000002917-2920, 000003058).

Individuals from Kodak's "security" forces in Rochester were sent to a Chicago, Illinois leasing company, Capital Leasing, and without authority, and illegally, seized \$25,000 worth of Kodak Ektaprint parts which they implied were "stolen" and stated the "FBI" would become involved. Kodak, although challenged, has not explained or justified its actions. (Dec. Varing ¶¶ 8-11; Dec. Hennefer ¶ 32). Additionally, the same individual from Kodak's Rochester "security" force came into the offices of CPO Limited, a Kodak Ektaprint service and used equipment competitor, demanding documents and records on a legitimately owned, brokered and

resold Kodak machine, implying it too was "stolen." Again, no justification, or court process was proffered by Kodak. (Dec. Arnold ¶ 18)

C. Kodak's Parts Suppliers Refuse to Deal with ISOs

As a result of Kodak's cut off parts, many ISOs attempted to purchase parts directly from Kodak's parts suppliers. On non-patented parts, almost across-the-board these parts suppliers refused to deal with ISOs, citing arrangements with Kodak. (Dec. Searle ¶¶ 15, 16; Dec. Welch ¶¶ 21, 22; Dec. Hernandez ¶ 60) Kodak was aware of such refusals. (Kodak Doc. No. 000002919)

D. Kodak Policies On Used Photocopy Equipment

Kodak initiated its campaign against third party service of Ektaprint copiers and brokered equipment with the cut-off of parts to ITS in June, 1985. On August 5, 1985, Kodak, in a memo from E. Ince and M. Murray of CESD and Kodak Copy Products noted its "interest" in the "appearance of third party service organizations" in connection with its interest in Ektaprint copiers "sold to its customers by equipment brokers or other third parties." (Dec. Murray, Exhibit 7).

While Kodak's "current" business practices as set out in the April 5, 1985 letter purported to limit Kodak's actions to: 1) assuring that servicing of third party Ektaprint copiers was limited to machines that were brought up to Kodak standards; and, 2) assuring that parts were available only to direct purchasers of Kodak

Ektaprint copiers from Kodak, the intent and practice were different.

The intent, as stated by Kodak service representatives, and Mitchell Bendar, of Copy Products, was to put third party brokers of Ektaprint copiers out of the Kodak business. The practice was to make it as difficult as possible for brokers and buyers of third party Ektaprint copiers (not sold directly by Kodak). A series of steps were implemented by Kodak to assure this. The initial "pre-installation inspection fee" for inspecting a machine and determining what was required to bring it up to standard, announced August 1985, was raised up to 500% in January 1987. The reconditioning centers, for bringing machines up to standard, which had been located around the United States, were closed down and centralized in Rochester, making transportation and reconditioning extremely difficult. (Dec. Varing ¶ 15). The useful life on the *same Kodak reconditioned machine* was guaranteed if the machine was purchased by Kodak, but not if that machine was traded by a third party broker for a brokered machine. (Dec. Arnold 19). Kodak technicians were instructed to make the preinstallation inspection and reconditioning as expensive as possible. Machines that had hitherto been put on Kodak's service because of high-quality reconditioning by third party brokers were refused for service on spurious grounds. (Dec. Arnold ¶¶ 16-18; Dec. Varing ¶¶ 18, 19) Kodak's district service representative admitted that there were "new pressures" being applied from Kodak in Rochester to make service difficult. (Dec. Arnold ¶¶ 9-10).

Kodak, as it tightened up on service availability for Ektaprint machines drove the price of these machines

down. Whereas a Kodak Ektaprint machine 150AF sold for approximately \$12,000 before Kodak began its actions, its price had been reduced to approximately \$2500 by 1987. (Dec. Arnold ¶¶ 6-7; Dec. Hernandez ¶¶ 5, 6). This drop in price made even the expenses associated with Kodak's campaign to maximize inspection/reconditioning/service expenses worthwhile to undertake by reconditioners. At this point, Kodak, on February 1, 1987, introduced a new condition that stated "remanufacturing for equipment not purchased directly from Kodak is available at the sole discretion of Kodak" and has used this term to refuse to recondition machines of active Kodak Ektaprint broker competitors. (Dec. Varing ¶ 18; Dec. Arnold, Exhibit C).

E. Changes of Kodak's Terms of Sale and Parts Principles

Kodak did not change its Replacement Parts Principles until December 2, 1985 to, in part, reflect its prior changes in practice. The "Replacement Parts Principles" eliminated the same statement on that date. Kodak again modified its terms of sale on December 1, 1986 to try to reflect its revised practices in cutting off parts to third party service competitors in the micrographics and photocopy area. (Dec. Hernandez Exhibits B and C)

The parts policies of Kodak's CESD Parts Services Division, contrary to Kodak's implications, had *always*, kept replacement parts stocks "maintained . . . at a level carefully planned to fulfill Kodak's commitments only for its dealers and distributors, users and CESD customers."

(Dec. Hernandez, Exhibit A) The new "business justifications" offered for the 1985 reduction of parts for third party servicers, to institute controls that had existed for years, does not conform with Kodak's longstanding "Replacement Parts Principles". Moreover, a simple review of Kodak's tremendous effort to attempt to ferret out its competitor BENUs, when Kodak admits that less than 5% of the specially processed parts orders were ever denied, was considerably more expense than any alleged savings from lower inventories. (Kodak Doc. 0000065)

F. Kodak Makes Substantial Profits on Parts

Kodak's further "business justification" that it was not making a reasonable return on assets, and that Kodak ISO's were "free-riding" is totally without factual support.

First, many ISO's have inventories of Kodak parts substantially greater than Kodak's. B.C.S. Technical Services, for example "turned" its parts inventory once every three years. Kodak's CESD Parts Services is able to turn its parts inventory every 60 days. (Dec. Welch ¶ 19). Other Kodak ISO's also stocked substantial parts for their service, and ordered parts well in advance. Kodak, moreover, manufactures approximately 10% of its own parts. It is merely a "broker" of these parts which it sells at a substantial mark-up. (Kodak Document Nos. 2375-2902; Dec. Welch ¶ 20; Dec. Kastner ¶ 13; Dec. Damiani ¶ 21). Kodak charges ISO competitors twice what it prices the same parts to its equipment service representatives for. This price to ISO's, as of September 1, 1986 was raised by an additional 10%. This mark-up on parts, where other

sources are available, shows that Kodak has almost twice the mark-up of other vendors for the same parts. (Dec. Kastner ¶ 13).

G. Kodak's Anti-Competitive Intent

Kodak has not only manifested an anti-competitive intent in its policies and actions but it has directly stated it. The statements of John A. Lacy to Paul Gilbertson of CSC indicate that Kodak's BISD could control ISOs since it "has them by the balls" because of the replacement parts. (Dec. Hernandez ¶ 54) The statements by the Copy Products manager Mitchell Bender that they would put the Kodak Ektaprint brokers out of the Kodak business, likewise manifests an anti-competitive intent. The creation of a "tiger team" clearly connotes predatory intent, and not a benign business interest in parts control. (Kodak Document Nos. 000081-82). The illegal confiscation of parts and pressuring of Ektaprint brokers and ISO's is without business justification and also demonstrates anti-competitive intent (Dec. Varing ¶¶ 8-11). The timing of the parts cut-off to ITS, just after its successful bid against Kodak for the State of California, is likewise anti-competitive. (Hernandez Dec. ¶¶ 19-23) Discussing losses to ISOs, one letter said "Parts availability for third party service is a step forward. We will need the ability to provide cost effective service as well" (Kodak Doc. 00003389).

H. The Effects of Kodak's Actions

The competitive effects of Kodak's actions are obvious. Kodak ISO's have been unable to expand, and

many have lost substantial accounts and revenues in the past one and one-half years. (Dec. Hernandez ¶¶ 28, 29; Dec. Searle ¶¶ 4, 12-13; Dec. Tamvacakis ¶ 16; Dec. Damiani ¶¶ 22-23). Customers who paid, and are paying supra-competitive prices do not have the option to bargain for lower prices and better quality service, such as CSC did with plaintiff ITS. (Dec. Hernandez ¶¶ 46, 48-50). ISOs, who once competed with Kodak, have gone out of business (Dec. Tamvacakis ¶ 15; Dec. Hernandez ¶ 35; Dec. Welch ¶ 5).

In the Kodak photocopier area, the market for used photocopiers has greatly diminished in number of machines, and in value. Owners, locked-in by the low residual values (which is not alleviated by Kodak's high trade-ins since they are then required to buy more Kodak machines) are not selling their machines, since these represent investments that, for example, cost \$75,000 a few years ago and now have a value of \$2500. (Dec. Varing ¶ 17; Dec. Hernandez ¶ 41; Dec. Arnold ¶ 7). The business of brokers in Ektaprint machines has been greatly reduced, and consumers desiring to purchase Kodak machines have less supply and, as a result of Kodak's inspection/reconditioning/service requirements, substantially higher costs. (Dec. Varing ¶¶ 12, 20; Dec. Hernandez ¶¶ 56-57; Dec. Arnold ¶ 23).

Unlike the market for service of IBM and Xerox photocopy machines, and that of Micron, Microdesign and Fuji for micrographics machines, the market for service of Kodak equipment is moving toward a total Kodak monopoly and supra-competitive prices again. The San Francisco Bay Area, where Kodak ISO service was alive, and as to which service the Kodak district manager said:

"Kodak's price was twice that of ITS. Of course we lost the bid. To date they have received an average of two hour response time, no problems with parts, and overall are very satisfied with the quality of service they have received from ITS. (Kodak Document No. 00003082)

will soon not have these competitors. The severe detriment to consumers in the marketplace because of the loss of such service, in terms of price, quality and availability of the product at issue – Kodak micrographics and photocopy service – cannot be seriously refuted.

LEGAL ARGUMENT

I. Summary Judgment Is Not Appropriate Where There Is Conflicting Factual Evidence And Issues Of Motive And Intent Are Present

In *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), the Supreme Court cautioned against the improper use of summary judgment in complex antitrust cases, stating:

We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, and proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice." *Id.* at 473.

Summary judgment may be an appropriate method to test the validity of the underlying antitrust theory in certain cases, but only if, without controverting the validity of the plaintiff's factual contentions, the acts of defendant, as a matter of law, simply do not amount to an

antitrust violation. See, *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977). This is not the case here.

The case of *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.* ___ U.S. ___, 106 S.Ct. 1348 (1986) has not changed this principle one iota, but has reinforced it. There, plaintiff's claim of predatory pricing was found, even if all the facts asserted were true, to be implausible and to make no economic sense. Here, it is Kodak's case, for "interbrand" competition, that makes no economic sense.

The Ninth Circuit reaffirmed the validity of *Poller* in *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1477 (9th Cir. 1986) (decided after *Matsushita*) and stated, citing *Poller*:

Although summary judgment generally is disfavored in antitrust litigation, [citations omitted] it appropriately may be granted if the non-moving party does not show any issues of material fact and does not present an adequate record to support a finding in his favor. *Filco v. Amana Refrigeration, Inc.* 709 F.2d 1257, 1260 (9th Cir.), cert. denied, 464 U.S. 956, 104 S.Ct. 385, 78 L.Ed.2d 331 (1983).

Where, as here, valid antitrust theories are alleged, and there is evidence of anticompetitive intent and anticompetitive effect, which evidence is claimed by defendant to be insufficient as a matter of law, summary judgment should be sparingly granted. See, e.g., *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Impro Prods, Inc. v. Herrick*, 715 F.2d 1267 (8th Cir. 1983), cert. denied, 104 S.Ct. 1282 (1984); *Battle v. Lubrizol Corp.*, 513 F.Supp. 995 (E.D. Mo 1981), aff'd by equally divided court

(en banc), 712 F.2d 1238 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___ (1984).

In the present motion for summary judgment Kodak has attacked plaintiffs' case on two major fronts: 1) product market definition; and, 2) injury to the "interbrand" market. Kodak has, however, as to the Kodak service market, and as to the existence and effects of the "lock-in" of Kodak machine owners, presented no credible factual materials supporting its position and attacking plaintiffs' position. Plaintiffs really need not even present evidence on these issues. *Aickes v. Kress & Co.*, 398 U.S. 144, 160 (1969); *Dalke v. Upjohn Co.*, 555 F.2d 245, 248 (9th Cir. 1977), *White v. Thomas*, 660 F.2d 680, 682-683 (5th Cir. 1981).⁴

II. The Kodak Service Markets Are Relevant Product Markets

In a Section 2 monopolization case, relevant product⁵ market is determined by the reasonable

⁴ see Advisory Committee Note to Fed.R.Civ.P. 56 ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment may be denied even if no opposing evidentiary material is presented."). Plaintiffs, nevertheless have presented extensive evidence establishing the product market, and the "lock-in" of Kodak machine owners, which creates genuine issues of material fact.

⁵ "Product" means product or service. 1984 U.S. Department of Justice Merger Guidelines, Dec. Hennefer, Exhibit A, section 2.0; see *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (making clear that relevant product market test applies

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interchangeability of products in meeting a consumer need. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956). Reasonable interchangeability may occur because several different products are reasonable substitutes for the same use ("demand side substitutability") or because suppliers of different products can and will readily begin to produce the product necessary for the use (supply side substitutability"). See *duPont*, *id.*; see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

Two products are determined to be within the same market if their prices are responsive to each other. If the prices of the products move together, it demonstrates a low cross-elasticity and high degree of competitiveness. *duPont* at 400. In addition to examining relative price patterns, courts examine certain "practical indicia" in defining the appropriate product market. *Brown Shoe*, 370 U.S. at 325.⁶ These "practical indicia" include:

[I]ndustry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and usage, unique production facilities, distinct customer, distinct prices, sensitivity to price changes, and specialized vendors.

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to market for service); *C.E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1244 note 1, (5th Cir. 1985) (Section 2's proscriptions apply with equal force to both service and product markets.").

⁶ *Brown Shoe* involved examination of a proposed merger under Section 7 of the Clayton Act. The *Brown Shoe* test for defining markets was adopted for monopolization cases in *Grinnell*. See also *C.E. Services v. Control Data Corp.*, 759 F.2d 1241, 1246 (5th Cir. 1985).

Id.; see also Department of Justice Guidelines at section 2.12.

In this motion, the issue is whether there can be relevant markets or submarkets for the products that are the subject of this litigation. These products are: 1) service of Kodak micrographics machines; and 2) service of Kodak Ektaprint copiers. To resolve this issue, the relevant market test developed and synthesized by *duPont*, *Brown Shoe* and *Grinnell* must be applied to the proposed markets – that is, the markets for service and repair of Kodak micrographics machines and Ektaprint copiers.

Kodak's premise is that if there exist markets for micrographics and copier machines in which Kodak is a player, there cannot co-exist markets or submarkets for the service and repair of Kodak micrographics machines and copiers as a matter of law. This premise is incorrect. Trusting to this incorrect premise, Kodak has not even attempted to analyze the competitive circumstances of the products at issue in this litigation – service of Kodak micrographics and copy machines – and has not applied the *duPont/Brown Shoe/Grinnell* test to define the market in which this product is traded.

A. The Market for Service and Repair of Kodak Hardware System Can Exist as a Matter of Law

Kodak cites five cases in an effort to convince this Court that precedent precludes finding a relevant market for service and repair of Kodak micrographics machines and photocopiers. (Kodak brief at pp. 32-34) The proper delineation of the relevant market is a question of fact

that must be determined upon examination of the particular facts in each case. *DuPont*, 351 U.S. at 395, note 22.

Kodak's position in this motion is similar to the defendants' position in *Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977). In *Heattransfer Corp.*, the defendants lost on the relevant market issue. The Fifth Circuit found that the relevant product market could be confined to the sale of air conditioners for use in Volkswagen, Audi and Porsche automobiles. 553 F. 2d at 981 ("[W]e cannot find, as a matter of law," that the jury's finding that the market consisted of the sale of air conditioners for use in VWoA imported automobiles was incorrect.") The *Heattransfer* Court found unpersuasive the defendants' argument that relevant product market cannot be limited to one product. Instead, the court applied the tests enunciated in *duPont* and *Brown Shoe*.

In each of the cases cited by Kodak, relevant product market was determined by examining the particular facts of the case. This is necessary because of the "ad hoc, fact-specific core embedded in any determination of relevant market." *C.E. Services*, 759 F.2d at 1245, citing *Heattransfer*, 553 F.2d at 979; see also *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 812 F.2d 1160, 1171 (9th Cir. 1987) (District Court erred in deciding relevant market issue as a matter of law because market determination is a question of fact.)

Kodak relies primarily upon *General Business Systems v. North American Philips Corp.*, 699 F.2 965 (9th Cir. 1983) where plaintiff proposed a product market for the sale of magnetic ledger cards used to operate one brand of computers. The magnetic ledger cards are an integral part of

the computer and the computer cannot work without them. The court thus found there was no separate market for metal ledger cards, and the appropriate product market was the market for small business computers.

General Business Systems was properly distinguished from *Heattransfer* in the case of *Slocomb Industries, Inc., v. Chelsea Industries, Inc.*, 1984 - 1 Trade Cases (CCH) para. 65, 932 (E.D. Pa. 1984). The court in *Slocomb* noted that the metal ledger cards in *General Business Systems* were integral parts of the small business computers in which they were contained, that the small business computers could not be run without these parts, and that the two were naturally sold together. In contrast, the air-conditioning units in *Heattransfer* were not integral to the automobiles in which they were placed. The court stated:

Consequently, there is no interchangeability where the final product is useless without its component parts, as here and in *General Business Systems*, but contrary to *Heattransfer Corp.*

Slocomb at 68,028.

Applying this distinction to the Kodak micrographics and photocopy service industry, it is obvious there can be a separate market for service of Kodak micrographics machines and Kodak photocopy machines. Service is not a "component part" without which a micrographics or photocopy machine cannot operate when sold. Micrographics and photocopy machines and service are not normally sold together. This is the case of most manufacturers who allow independent service for their micrographics and photocopy machines. In such cases they are always sold separately. This is true for micrographics

machines for such brands as Micron, Microdesign, Information Design, Alos, and Fiji (Dec. Hernandez ¶ 55). This is also true for photocopy machines for such brands as IBM and Xerox (Dec. Varing ¶ 21).

Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (5th Cir. 1978), cited by Kodak at pages 27 and 33 of its brief, is one of the few existing cases dealing with service of equipment cited by Kodak.⁷ In *Spectrofuge*, the court characterized the definition of the relevant market as "essentially a matter of resolving factual issues." 575 F.2d at 276. *Spectrofuge* is thus, by its own terms, a case involving a failure of proof on a factual issue.

In *Kaplan v. Burroughs Corp.*, 511 F.2d 286 (9th Cir. 1979), also cited by Kodak, the Ninth Circuit repeated the admonition that the relevant market is fact specific.⁸

⁷ Kodak also cites *Dimidowich v. Bell & Howell*, but only to incorrectly state that it does not apply. Additionally, Kodak cites *Bushie v. Stenocard Corp.*, 460 F.2 116 (9th Cir. 1972) which involved the sale and service of office dictating machines. As the facts of this case demonstrate, this activity bears little, if any, relationship to the business of servicing the micrographics systems such as that at CSC, or large and expensive Kodak Ektaprint copier-duplicators.

⁸ "The *Brown Shoe* indicia are not to be used in a 'talismanic fashion' whereby their presence or absence are regarded as mechanically dispositive of the issue." *Id.* at 292; "*Brown Shoe* compels us to examine a variety of factors in defining relevant submarkets" *Id.* at 294. The "indicia"

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Certainly, in the case at bar, for an owner of many pieces of expensive Kodak micrographic equipment or photocopy equipment, changing brands of such micrographics systems or large copier-duplicators because of supra-competitive service prices (which are at most a few percent per year of the cost of switching to an alternative brand) is not "reasonably available." It makes no economic sense.

Courts have held that discrete markets for service of a particular product exist. In the case most directly on point, *C.E. Services v. Control Data Corp.*, the Fifth Circuit

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discussed by the Ninth Circuit in *Kaplan* included: "the availability of alternative commodities for buyers" (citing *Fount-Wip, Inc. v. Reddi Whip*, 568 F.2 1296, 1301 (9th Cir. 1978), and "alternatives reasonably available to the consumer." *Id.* at 292.

In *Kaplan*, the plaintiff's case depended on a market definition of only batch processors in the San Francisco area using Burroughs equipment at the time of the alleged antitrust violation. This the court rejected, in dismissing Kaplan's claim that his potential "Burroughs users" customers were restrained, since Kaplan's potential data process customers included "a very wide spectrum of businesses (which) were capable of using electronic data processing at the time." *Id.* at 295. The "reasonably available" potential customers of Kodak service ISOs clearly do not include persons who do not own Kodak micrographics or photocopy equipment. The specific facts of *Kaplan* have no relevance to the market determination here.

found there was a separate market for the service and repair of IBM 360 and 370 systems.⁹

By recognizing the existence of such a service, *C.E. Services* decisively rebuts Kodak's contention that it is impossible as a matter of law for there to exist a relevant market for the service and repair of a single manufacturer's equipment.

Further supporting Plaintiff's contention is the Ninth Circuit's recent decision in *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986). The "product" involved in *Dimidowich* was service of Bell & Howell equipment. The defendant Bell & Howell competed with plaintiff for the service of the equipment it manufactured and sold. The *Dimidowich* court used the concept of distinct product and service markets in analyzing the harm to competition resulting from the defendant's acts (803 F.2d at 1484) – an issue currently before this Court. The *Dimidowich* court stated:

[A jury] would be entitled to infer from the behavior of the conspirators that the agreement was designed solely to discourage or eliminate significant competitors in the service market, rather than to compete more effectually in the product market.

...

⁹ In *C.E. Services*, the plaintiff and defendant agreed that the product market was the market for service of IBM 360 and 370 systems. The dispute between the parties was whether IBM participated in the relevant market. The Court found that this was a disputed factual issue that could not be decided on summary judgment.

More importantly, the alleged agreement clearly has an anticompetitive effect on the market for service of B&H equipment.

Id. [emphasis added].

The many cases cited by Kodak are necessarily restricted as fact-specific holdings based on the particular circumstances of each case. The cases that most resemble the present matter, *Dimidowich* and *C.E. Services* actually support a finding of a severable service market and, more particularly, a discrete market for the service and repair of Kodak micrographics and photocopy equipment.

Kodak cannot prevail on its argument that it is impossible for such a market to exist as a matter of law. The facts of this case further demonstrates that Kodak cannot prevail at all.

B. Industry Facts Demonstrate That There Is A Market For The Service And Repair Of Kodak Equipment

The products at issue in this case are the service and repair of Kodak micrographics and the service and repair of Kodak photocopy equipment. Examination of the markets in which the products at issue are traded demonstrates that there is a separate market for each of these products based upon the tests enunciated in *duPont*, *Brown Shoe*, *Grinnell* and the Department of Justice ("DOJ") Merger Guidelines.¹⁰

¹⁰ Although the DOJ Guidelines are intended to apply to mergers, the relevant market concept in such an evaluation is the same as in a Section 2 monopolization case. See footnote 4, *supra*.

The basic measure in market definition is the cross-elasticity of demand and of supply between the product in issue and potential substitutes. *duPont*, 351 U.S. at 395, 400; *Brown Shoe* at 325; *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 111-113 (1984). A high cross-elasticity of demand (or supply) between a product and a potential substitute implies that a price increase in the subject product would be accompanied by a large increase in demand for (or supply of) the substitute product and therefore the substitute product would be in the same market. *duPont*, 351 U.S. at 400.

The DOJ Merger Guidelines attempt to quantify this concept by postulating, on the demand side, a 5% increase in the price of the product at issue, and assigning a test period of one year. DOJ Guidelines at Section 2.11.¹¹ The tests enunciated in the DOJ Guidelines provide an economically sound methodology for determining relevant market.

The cross-elasticities of demand and supply between the service of Kodak micrographics and photocopy machines and alternative products and services are high only for existing suppliers of service for Kodak micrographics and photocopy machines. The evidence shows that in the micrographic area, Kodak was able to sustain a

¹¹ If the 5% price increase can be sustained for the one year period, then a market limited to the particular product at issue is not too narrowly defined. *Id.* To test cross-elasticity of supply, the DOJ Guidelines ask how many firms would switch to producing the product in question within one year of a 5% increase in the price of the product. DOJ Guidelines at Section 2.21.

substantial supra-competitive price of 50% to 100% for years with many customers without them switching to "interbrand" competitors. It shows that for a long period of supra-competitive prices, no Kodak service organizations develop in competition to Kodak. (Dec. Hernandez ¶ 11; Dec. Damiani ¶ 11; Dec. Kastner ¶¶ 6-8) Consequently the relevant product market should be limited to service of Kodak micrographics and photocopy machines.

1. Demand Substitution

Demand substitution describes the consumer's movement to alternative products or services in response to a price increase for the product that is the subject of the litigation. If the degree of substitution is high between a potential substitute product and the subject product, the substitute product is considered to be within the relevant market. Kodak argues that Kodak equipment users could switch to other information systems as a substitute product. Cast in the most favorable light, Kodak's argument is that information system users are concerned only with the "total cost of ownership" of a piece of equipment including the costs of the equipment, software (where used) and service that go into the system during the entire life cycle of the system. This argument does not dispose of the issue before this Court, which is the degree to which Kodak equipment owners *will* switch to other brands in response to a price increase in Kodak service.

The evidence presented by plaintiffs shows that this does not occur. The primary reason for this lack of substitutability is that a very substantial number of Kodak equipment owners are "locked in" to their Kodak systems

or equipment. The costs of switching from one brand of system or equipment to another brand are extremely high. These costs include: 1) the purchase of the new equipment; 2) the loss of value in the old equipment; and 3) investment in new peripheral equipment compatible with the new equipment. The user, increasingly must also develop new software. The user must often also adapt his data to the new equipment. The user must train his personnel to use the equipment system and the new software. A new service contractor must be obtained.

The total cost of switching to another brand of equipment from a Kodak system for a large user like CSC would cost at least several hundred thousand dollars and could cost over \$2,000,000. A 5% increase in the price of maintenance of the Kodak system would not precipitate the drastic remedy of substitution of another brand system for "locked-in" Kodak customers — i.e., Kodak equipment owners.

This was exactly the case in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984) where the customers were considered "lock-in" customers, and provided the primary basis of defendant's power to coerce, 734 F. 2d at 1343.

There are additional reasons why Kodak equipment owners will not switch to another brand in response to a price increase for Kodak service. For example, consumers do not have a perfect ability to compare equipment costs on the basis of lifetime present value. (Dec. Hernandez ¶ 61) In addition to imperfect abilities to evaluate total costs, consumers may have good reasons to compare

capital costs and maintenance costs on a different basis. For example, government users may purchase systems out of a different budget than the budget out of which maintenance is purchased. (Dec. Hernandez ¶ 62)

Another good reason why increased maintenance costs would not precipitate a change in systems is that the Kodak equipment user would have to give up the functionality and features unique to the Kodak machine which provided the original reason for choosing the Kodak equipment.

In any event, Kodak clearly cannot pass the quantitative aspect of the DOJ substitution test with its theory that Kodak owners would substitute other brand systems in response to a price increase for Kodak service. Any substitution whatsoever is not sufficient to demonstrate the invalidity of the market service of Kodak equipment. Such substitution must be sufficient to prevent a 5% price increase within the period of one year. DOJ Guidelines at Section 2.11. Kodak has not provided a quantitative analysis at all. Plaintiffs have shown specific facts that Kodak customers have, and do, retain Kodak equipment despite supra-competitive prices. "Locked-in" owners are simply not going to exchange their Kodak machines within a year for other brands of machines in response to a 5% increase in the price of service.

2. Supply Substitution

Product market definition requires examination of the likelihood that alternative services suppliers may begin to offer service of Kodak equipment. *Brown Shoe*,

370 U.S. 294 at 325; DOJ Guidelines at Section 2.21. This phenomenon is referred to as "substitution in supply."

Kodak's own policies, which prevent all parts purchases, preclude supply substitution. Kodak itself has made the acquisition of parts impossible for any new entrant into the Kodak service market. Its stated policy is not to sell parts for Kodak micrographics equipment to any company which has not "previously and regularly purchased parts for the same equipment model" (Declaration Lorenson, Exhibit 1). Its stated policy is not to sell parts for photocopy equipment to independent Kodak servicers *at all*. The unavailability of parts means that an increase in the price for Kodak service would not induce a supply response from the providers of service for other brands of micrographics or photocopy equipment at all.

3. "Practical Indicia"

In addition to examining cross-elasticities of supply and demand, the courts look at certain "practical indicia" in determining relevant product market or submarket. These include:

industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and usage, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

Brown Shoe, 370 U.S. 294, 325; see also *C.E. Services v. Control Data Corp.*, 759 F.2d 1241, 1246 quoting *Brown Shoe*. Under each of the "practical indicia" listed in *Brown*

Shoe, the markets for service of Kodak equipment qualify as relevant markets or submarkets for antitrust purposes.

The manufacturers themselves consider service to be a distinct market from equipment. Kodak has a separate division for service, "CESD." This division has separate profit accountability and return on assets.

The service of Kodak equipment requires specialized knowledge and distinct parts. (Dec. Hernandez ¶¶ 6-8). Kodak parts are unique, and there is little or no interchangability between Kodak parts and parts for other micrographics or photocopy equipment (Dec. Hernandez ¶¶ 10, 13).

Kodak equipment owners constitute "distinct customers" for Kodak service. The uniqueness of Kodak equipment training required to service Kodak equipment is also a characteristic that makes the product - Kodak equipment service - unique. Furthermore, the customers of Kodak service need not be the same customers who contracted for the purchase of the Kodak equipment in the first place, but may be purchasers of used equipment. The prices for service of Kodak equipment do not follow the prices for service of other micrographics or photocopy equipment, nor do they follow the prices for purchases of equipment.

Kodak's legal definition of a product market is based upon the concept that the product market in an antitrust case is defined by everything that a defendant does. There is a different product market depending upon who is being sued. This construct flies in the face of the obvious fact that Kodak competes head to head with

Plaintiffs for service contracts. (Dec. Damiani ¶¶ 5,6; Dec. Arnold ¶ 5; Dec. Anderson ¶ 5).

The purpose of market definition is to aid in determining the effects of actions on customers by identifying the affected products and services and by determining whether demand and supply substitution are sufficient to eliminate those effects. *ILC Peripherals v. International Business Machines*, 458 F. Supp. 423, 428 (N.D. Cal. 1978). Market definition proceeds by identifying the product at issue in a particular case and by investigating the probabilities and extent of substitution in demand and supply for that product. *DuPont*, 351 U.S. 377 at 395; DOJ Guidelines Sections 2.11, 2.12, 2.21. The relevant market is a neutral concept and does not vary depending upon who is being sued. *DuPont* at 395-396 (relevant market is determined by examining substitutability for commodity in issue).

Kodak has not investigated this industry and has not provided the Court with information on how servicers of Kodak equipment operate or how consumers of Kodak service behave.

II. Injury To The Market

Injury to the relevant market is demonstrated by detriment to consumers in the market in terms of price, quality and availability of the product at issue. *Aspen Skiing Company v. Aspen Highlands Skiing*, 472 U.S. 585, 105 S.Ct. 2847, 2859 (1985); *R.C. Geothermal Corp. v. Thermal Genetics, Inc.*, 812 F.2d 1160, 1166-1167 (9th Cir. 1987); *Dimodovich v. Bell & Howell*, 803 F.2d 1473, 1484 (9th Cir.

1986); *Ralph C. Wilson Industries v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1364 (9th Cir. 1986) *aff'g* 598 F. Supp. 694, 704 (N.D. Cal. 1984).

Kodak's argument that there is no harm to competition is based upon its incorrect definition of the relevant markets. Kodak argues that there is no damage to "intense interbrand equipment competition" (Brief p. 21). The facts make it clear however that there are substantial competitive effects and injury both to plaintiff ISOs, and to consumers of Kodak micrographic equipment service and Kodak Ektaprint copy service. Plaintiffs have lost existing customers (Dec. Tamvacakis ¶ 16; Dec. Searle ¶ 12; Dec. Anderson ¶ 11; Dec. Damiani ¶¶ 22-23). Kodak service providers have gone out of business as a result of Kodak's actions (Dec. Tamvacakis ¶ 15; Dec. Hernandez ¶ 35; Dec. Welch ¶ 5). The expansion and future business of plaintiff Kodak ISO's has been lost (Dec. Searle ¶¶ 4, 13; Dec. Varing ¶ 20; Dec. Damiani ¶ 4; Dec. Welch ¶ 8). As a result, consumers of Kodak service have lost availability of the product at issue, under the *Aspen* standard.

Consumers have also lost substantial price advantages under the *Aspen* standard. Kodak's own personnel admit to 50% lower prices by ITS (Kodak Document No. 00003082). Many other examples of substantial price differences, often of 50%, which would be available to customers if existing ISOs are not driven out of business and are able to expand. (Dec. Hernandez ¶¶ 30, 50; Dec. Damiani ¶ 5; Dec. Kastner ¶ 7).

Finally, under *Aspen*, the consumers of Kodak service will lose the higher quality Kodak micrographic and photocopy service they have received. (Dec. Hernandez

¶¶ 12, 34; Dec. Damiani ¶¶ 5, 6 and 11; Dec. Searle ¶ 14; Kodak Document No. 00003082).

III. TYING CLAIMS

Section 1 of the Sherman Act 15 U.S.C.A. 81 (1982) ("Section 1") and Section 3 of the Clayton Act 15 U.S.C.A. §14 (1982) ("Section 3") both make tying arrangements unlawful. Illegal tying arrangements may receive a rule of reason analysis under Section 1, *Fortner Enterprises, Inc. v. United States Steel Corp.*, (Fortner I) 394 U.S. 495, 500, 89 S.Ct. 1252, 1257 (1959), *United States Steel Corp. v. Fortner Enterprises* (Fortner II) 429 U.S. 610, 612 n.1, 97 S.Ct. 861, 863 n.1 (1977), *Phonetele, Inc. v. American Telephone & Telegraph Co.*, 664 F.2d 716, 738 (9th Cir. 1981), *cert. denied* 459 U.S. 1145, 103 S.Ct. 785 (1983). Tying arrangements are usually challenged under the test of presumptive illegality under Section 1 and Section 3. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551 (1984), (Section 1), *International Business Machines Corp. v. United States*, 298 U.S. 131, 56 S.Ct. 701 (1936) (Section 3), *Hirsch v. Martindale - Hubbell*, 647 F.2d 1343, 1346-47, *cert. denied*, 459 U.S. 973, 103 S.Ct. 305 (1982) (Sections 1 and 3). Plaintiffs herein allege, and the facts show, that Kodak has tied to its replacement parts: 1) Kodak service and 2) the purchase of new machines directly from Kodak. In doing so Kodak has engaged in *per se* violations of Section 1.

The Supreme Court has established that a plaintiff must prove four elements to receive the benefit of the *per se* presumption. The standard of proof requires that the

plaintiff show: 1) the tying and tied item constitute separate and distinct products, 2) the availability of the tying item has been conditioned upon the purchase of the tied item, 3) the party imposing the tie has sufficient economic power in the tying product market to appreciably restrain free competition in the tied product market, and 4) a not insubstantial amount of commerce in the tied item is affected by the arrangement. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6, 78 S.Ct. 514 (1958), *Fortner I*, *supra* at 499, *Fortner II* *supra* at 617-19, *Hirsh*, *supra* at 1346-47. However, even if the plaintiff proves these four elements the defendant may still escape liability by proving overall competitive reasonableness. See e.g. *Susser v. Carvel Corp.*, 332 F.2d 505, 520 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125, 85 S.Ct. 1364 (1965). Consequently, even though courts often state that tying is subject to per se illegality, the test really creates only a presumption of illegality.

The Ninth Circuit sometimes combines the first two elements of the tying test and states that the plaintiff must prove three elements to receive per se treatment. *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1338 (9th Cir. 1984), *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1479 (9th Cir. 1983), *California Glazed Computer Products v. Burns & Russell Co.*, 708 F.2d 1423, 1427 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 348 (1983), *General Business systems v. North American Philips Corp.*, 699 F.2d 965, 977 (9th Cir. 1983). The Ninth Circuit has also established two additional elements involved in a tying claim.

The court must ask whether the seller of the tying product has an "economic interest" in the

tied product, and whether a modicum of coercion was exerted by the seller of the tying item.

Elaine Powers, *supra* at 1479, *Moore v. Jas. H. Matthews & Co.*, (Moore II) 550 F.2d 1207, 1216 (9th Cir. 1977), See also *Jefferson Parish*, *supra* at 1559 (element of forcing justifies per se condemnation).

In *Foremost Pro Color Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 541 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1315 (1984), the Ninth Circuit stated the rationale behind the per se test.

The principal evil of the tying arrangement, that which has traditionally justified its inclusion in the per se category, is that it denies competitors access to the market for the tied product not because the party imposing the arrangement necessarily has a superior product in that market, but rather because of the leverage exerted as a result of its economic power in the market for the tying product and the demand for the tying product.

This is precisely the situation in the case at bar. Kodak's service was totally inferior from a price standpoint - often 50% inferior - yet because of its control over parts Kodak was able to control locked-in customers and sell its service over that of ISOs.

A. Separate Products

The first question in a tying case is whether two separate products exist. For example, in *Jefferson Parish*, *supra* at 1561 the issue was whether the anesthesiology services constituted a separate product.

The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations . . . the package includes the services of the anesthesiologist. Petitioners argue that the package does not involve a tying arrangement at all that they are merely providing a *functionally integrated package of services*. . . . Our cases indicate, however, that the answer to the question whether one or two products involved *turns not on the functional relation between them, but rather on the character the two items*. (Emphasis supplied).

The two products must be "distinguishable in the eyes of the buyers" *Id.* at 1562. See also *Fortner I*, *supra* at 89 S.Ct. at 1260-61 (footnote omitted). Service of micrographics and photocopy machines, both in Kodak machines, and, especially in Xerox, IBM, Minolta, Canon, Fuji and other machines where there are ISO competitors, is clearly distinguished by buyers as a separate product.¹²

¹² The Ninth Circuit has also stressed that the plaintiff must prove two separate products exist. In *Moore*, *supra* at 1212 the plaintiff argued that the defendant tied the purchase of a cemetery lot to the purchase of a cemetery marker and that the defendant tied the purchase of a cemetery lot to the purchase and use of the cemetery installation service. The court stated:

(i)n this circuit we have looked carefully at the "function of the aggregation" to determine whether only a single product is sold. . . . unless there are such considerations as legitimate cost savings or product used as a unit with fixed proportions, the tied product is generally regarded as "generically" distinct.

(Continued on following page)

2. Availability of Tying Item Conditioned

A tying arrangement is an agreement by a party to sell only one product on the condition that the buyer also purchase a different or "tied" product. *Foremost*, *supra* at 540. It requires proof that the buyer be forced to purchase a product he did not want. *Roberts Waikiki U-Drive, Inc. v. Budget Rent A Car System, Inc.*, 732 F.2d 1403, 1407 (9th Cir. 1984).

Here, Kodak has an express, written policy that they will not sell parts (with the de minimus self-servicers

(Continued from previous page)

Moore, *supra* at 1215. See also *Fortner I*, *supra* at 1255-56. (Sale of prefabricated homes and credit arrangement financing those homes are separate products. Plaintiff sued under Sections 1 and 3 but court used the same analysis and discussed the causes of action together.) *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567, 81 S.Ct. 755 (1961). (Complex cable antenna system with various component parts sold on system basis only. Held component parts and installation separate products.)

Digidyne, also supports Plaintiff's argument that the service of Kodak micrographic and photocopy machines are separate products not a mere integral component of the machines and the replacements parts for those machines. In *Digidyne*, *supra* at 1338-39, the defendant refused to license its RDO operating system to anyone who did not also purchase its NOVA CPU software instruction set, which was designed to perform a group of tasks. Although the court ultimately found no illegal tying arrangement, the Ninth Circuit agreed that the "district court properly granted summary judgment on the first . . . of the required elements of a *per se* violation . . . on the undisputed facts the NOVA instruction set CPU and defendant's RDOs are separate products" The practical realities of the micrographics and photocopy industry indicate that the service of machines and replacement parts for machines constitute separate products.

exception) except to persons who purchase Kodak service. Kodak also has an express written policy that they will sell parts for self service only if the buyer first buys a machine from Kodak. This is sufficient conditioning. See *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 593 F. Supp. 1506, 1517 (N.D. Cal. 1984) (tying language alone is sufficient, despite evidence that it was not enforced).

It is clear from the declarations and Kodak's documents that Kodak intended to, and did in fact coerce parties to accept its service because parts were unavailable otherwise, and that Kodak repeatedly refused sales of parts to buyers and prospective buyers of third-party equipment in order to coerce them to purchase machines directly from Kodak.

3. Sufficient Economic Power in the Tying Market to Appreciably Restrain Free Competition in the Tied Market

In proving the third element of the tying claim, the plaintiff is:

not required to prove a monopoly or dominant economic power, although proof that the seller occupies a dominant economic position in the market for the tying (sic) item satisfies this test. (Citations Omitted)

Moore II, *supra* at 1215. See also *Digidyne*, *supra* at 1339-40 (proof of power to fix the "price of the tying product in the whole of the relevant market" not required. "Possession by the seller of such monopoly power is sufficient to establish *per se* illegality, but it is not required.")

As the Supreme Court explained in *Fortner I*, *supra* at 1258-59

the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market Accordingly, the proper focus of concern is whether the seller has the power to raise prices or impose some other burdensome terms such as a tie-in with respect to any appreciable number of buyers in the market.¹³

Furthermore, market dominance is not the only test for determining whether the seller possessed the requisite economic power. As the Supreme Court stated in *United States v. Loew's, Inc.*, 371 U.S. 38, 45, 83 S.Ct. 97, 1012 (1962) (quoted with approval in *Digidyne*, *supra* at 1340)

Market dominance - some power to control price and exclude competition - is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from its uniqueness in its attributes.

¹³ See also, *Fortner II* *supra* at 867 ("power within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.") *Jefferson Parish*, *supra* at 1559 n.20 (power over whole market not required in a *per se* claim, Court requires "type of market power (that) has sometimes been referred to as leverage . . . loosely defined . . . as a supplier's ability to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of the second product.")

Kodak's market position in replacement parts satisfies this test. It has market dominance, controlling almost 100% of the market. Its prices are above that which would reasonably be charged, and *are* charged by other vendors, where such parts are available. It has the power to, and has shown the intent to exclude competition. It also has substantial product desirability, since these parts are an absolute prerequisite to servicing Kodak machines.

In *Moore II*, *supra* at 1216 the Ninth Circuit stated other possible indices of sufficient economic power include: a competitor's inability to offer equivalent products or services profitably, a noncompetitive higher price charged for the tied product or the existence of a substantial number of buyers accepting the tie-in terms. (Citations Omitted)

Both the elements of a "noncompetitive higher price charged for the tied product" – Kodak's overpriced service – and "the existence of a substantial number of buyers" – over 95% of the photocopy service market and over 80% of the micrographics service market – are present here. Plaintiffs can easily prove the third element of their *per se* tying claim by showing that Kodak imposed burdensome terms in its sale of service and implemented coercive tactics in controlling service in tying them the purchase of Kodak parts, with respect to an appreciable number of buyers. See *Digidyne*, *supra* at 1340.

D. Not Insubstantial Amount of Interstate Commerce Affected in the Tied Market

The final element to show a tying violation is that a not insubstantial amount of commerce is affected by the

tying arrangement. Not insubstantial means not *de minimus*. *Moore II*, *supra* at 1216.

The amount of commerce affected is not measured by the size or scope of any market foreclosed by the tie . . . the controlling consideration is "whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimus* is foreclosed by competitors. *Id.*

In *Moore* the court stated that the test has been met by showing dollar volumes and estimated sales. Plaintiffs' declarations satisfy this requirement.

Two other elements having been mentioned by the Ninth Circuit as involved in a tying claim. These are discussed below.

E. Economic Interest in the Tied Product

In *Moore II*, *supra* at 1216 the Ninth Circuit stated that in examining a tie-in claim, several additional questions must be answered. The first determination is whether the seller of the tying product has an economic interest in the tied product. Clearly by conditioning the sale of cemetery lots on the buyer's use of the cemetery's installation and care service or purchase of a marker from the cemetery, the test is met. Those cemeteries adopting a purchase requirement "through" the cemetery also have the requisite economic interest because they received a commission or profit on monument sales.

In *Elaine Powers*, *supra* at 1479 the Ninth Circuit also stated that

our focus in this case is on the requirement that the seller have an economic interest in the tied product, i.e., that Elaine Powers has an economic interest in the Gillander's bookkeeping service.

The court in *Elaine Powers* then found that there were genuine issues of material fact as to the economic interest requirement.¹⁴

The economic interest of Kodak in its service and selling its new machines direct is obvious. It derived large revenues and benefits from the sale of Kodak service and new Kodak machines and had a strong interest in promoting their use to the exclusion of lower price competitors such as plaintiff ISOs and brokers.

F. Coercion

As long as "the buyer is free to take either product by itself there is no tying problem." *Northern Pacific supra* at 518 n.4. "Accordingly, we (the Supreme Court) have condemned tying arrangements when the seller has some special ability . . . to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish, supra* at 1559. The Supreme Court has stressed that when the forcing element is present, the Sherman Act is violated.

¹⁴ See also *United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369 (N.D. Calif. 1984). (Defendant had economic interest in tied product, automobile replacement parts. Dealers obtained parts from many sources. Even though defendant not sole seller of tied product, defendant had direct economic interest.)

The Ninth Circuit has stated that a modicum of coercion is also essential to a tying claim.

The classic example of coercion in a tying arrangement is the *Laerus'* case, *supra* where the sale of the rights to several desirable films was conditioned on the television network's purchase of undesirable ones. Although some cases in other circuits have required a showing of actual coercion, our reading of the Supreme Court's opinions supports the view that coercion may be implied from a showing that an appreciable number of buyers have accepted burdensome terms, such as tie-in and there exists sufficient economic power in the tying product market. Coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes.

Moore II, supra at 1217.

The Court stated that even though the purchaser of a cemetery lot was not absolutely required to purchase a marker coercion can still occur.

(In *Siegel*) we refused to accept appellant's individual coercion theory and we were not troubled by the fact there was no evidence to show that each of the 650 franchisers had been required to purchase the equipment, mixer and packaging. A showing of onerous effect on an appreciable number of buyers coupled with a demonstration of sufficient economic power in the tying market is sufficient to demonstrate coercion. (Citations Omitted)

Id. at 1217.

A showing has been made of coercive tactics by Kodak in selling its service and policing its parts monopoly. In a free market without coercion, customers would

no more pay 100% more for poorer quality service, as CSC and others were, without a supplier having certain coercive power.

IV. Concerted Refusal To Deal

Concerted refusals to deal fall in the category of "classic" group boycotts if they involve horizontal restraints from which business competitors seek to benefit by excluding other competitors from the marketplace. These are illegal per se under Section 1 of the Sherman Act. *Klor's Inc. v. Broadway Hale Stores, Inc.* 359 U.S. 297, 212 (1959).

Kodak's agreements to sell replacement parts to owners of Kodak equipment service bureaus and to Kodak brokers on the agreement by them that they will not resell these to Kodak's competitors in the Kodak micrographics and Ektaprint photocopy machine service area and its combination with the manufacturers of its parts to prevent ISOs from buying them at their source falls under the per se rule. Kodak has a monopoly position in these parts which is different from the "natural monopoly" it has over its own machines. It has been acquired by and depends on agreements with others for enforcement.

Unlike *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.*, (416 F.2d 71, 76 (9th Cir. 1969) cert. denied 396 U.S. 1062 (1970) there is a definite "anticompetitive," motive by Kodak in excluding plaintiffs and other Kodak ISO servicers from obtaining parts. It is distinguished from the cases discussed in *Hawaiian Oke* in that here,

there is an exclusionary and anticompetitive purpose. Kodak representatives have so stated. Kodak, service bureaus who service some of their clients' micrographics equipment, and self-servicers of micrographics equipment and Ektaprint photocopy equipment are all horizontal competitors. Kodak brokers are potential competitors. An agreement to exclude ISOs as competitors among these parties is *per se* illegal under *Klors* and its progeny.

It does not matter that the participants in the boycott may be coerced. As discussed in *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986):

There is a line of cases that supports the proposition that a manufacturer may form a "conspiracy" or "combination" under the antitrust laws if it imposes restraints on . . . customers by coercive conduct and they involuntarily adhere to those restraints. *Albrecht v. Harald Co.* 390 U.S. 145, 149-50, 88 S.Ct. 869, 871, 19 L.Ed.2d 998 (1968), *United States v. Parke, Davis & Co.* 362 U.S. 29, 44-45, 80 S.Ct. 503, 511-12, 4 L.Ed.2d 505 (1960). . . .

It is clear that Kodak has exerted just such restraints on customers of Kodak parts by its coercive conduct, and on suppliers to prevent them from selling Kodak replacement parts which they have to its competitor ISOs. Such a "conspiracy" or "combination" may be found a per se refusal to deal under Section 1 of the Sherman Act. See *Black Gold Ltd. v. Rockwool Industries*, 729 F.2d 676 (10th Cir. 1984)

VII. "Hybrid" Refusal To Deal

The Ninth Circuit in *Dimidowich v. Bell & Howell* 803 F.2d 1473 (9th Cir. 1986) modified 810 F.2d 1517 (1987) found, with regard to distributors who deal with a manufacturer operating at two distinct levels of the distribution chain, acting both as a supplier, and a distributor of its own products that a "hybrid" arrangement of both vertical and horizontal elements existed. The court concluded that under the Sherman Act a rule of reason analysis, would be appropriate for a "hybrid" conspiracy such as this. *Id.* at 1481.

Kodak's relationship with service bureaus who sell Kodak film and other supplies and service as well, but who receive parts on the condition that they can not be resold, falls within the Ninth Circuit decision in *Dimidowich*. Proof of agreement between Kodak and service bureaus, who also provide service for which plaintiff Kodak ISOs compete would prove a "hybrid" arrangement, tested under the rule of reason for anticompetitive intent and anticompetitive effect. Since it is clear that the arrangements involving Kodak's concerted refusal to deal with ISOs have both anticompetitive intent and effect in foreclosing ISOs from the relevant market, and, since the alleged procompetitive effects of the "interbrand" market do not apply, plaintiffs have made out a case for violation of the Sherman Act under *Dimidowich*.

VIII.

MONOPOLY LEVERAGING

An attempt to monopolize may also be found under Sherman Act Section 2 for "monopoly leveraging". "Monopoly leveraging" is where a firm with monopoly power attained in one market attempts to use such power as leverage to gain a competitive advantage in another market. "Monopoly power is the power to control prices or exclude competition." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). To prove a \$2 monopoly claim, a plaintiff must show "(1) possession of monopoly power in a relevant market, (2) willful acquisition or maintenance ('use') of that power, and (3) causal antitrust injury." *Catlin v. Washington Energy Company*, 791 F.2d 1343 (9th Cir. 1986), citing *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983).

This allegation was made, for example, in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). (Alcoa's practice price squeeze on ingot supply constituted an unlawful exercise of Alcoa's monopoly power).

The *United States v. Griffith*, case 334 U.S. 100, 68 S.Ct. 941 (1948), which also involved an allegation of monopolization, established that the use of monopolistic success in one area to achieve an advantage in a second market may constitute a violation of Section 2 of the Sherman Act.

Circuit Courts of Appeals have likewise recognized that a defendant who utilizes its monopoly power in one

market to attempt to monopolize a second market violates Section 2 of the Sherman Act. Monopoly leveraging has been defined by the Second Circuit as "[the] use of monopoly power attained in one market to gain a competitive advantage in another." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2nd Cir. 1979). This theory of antitrust liability under §2 of the Sherman Act has yet to be endorsed by the Ninth Circuit but is awaiting a case which presents the requisite elements. *Catlin v. Washington Energy Co.*, 791 F.2d 1343 (9th Cir. 1986).

The essential elements of a monopoly leveraging claim are: (1) monopoly power in a relevant market; (2) challenged activities in a defined second market, distinct from the first (monopoly) market; (3) 'use of advantages that [the monopolist] enjoys by virtue of size, integration, etc.'; (4) 'unwarranted competitive advantage' in the leveraged market; and (5) causal antitrust injury.

Id. at 1349, citing *Grason Electric Co. v. Sacramento Municipal Utility District*, 571 F.Supp. 1504, 1518-19 (E.D. Cal. 1983). This is that case.

Kodak is clearly using its acquired monopoly power in parts, even if legally attained, in the distinct market for Kodak service. It is obtaining an unwarranted competitive advantage over plaintiff ISOs, with substantial anti-competitive effects and injury.

IX.

SUMMARY JUDGMENT SHOULD BE DENIED UNDER RULE 56(f)

Plaintiffs are mindful of the Court's position on summary judgment as a means of defining and managing cases. Plaintiffs have, with this in mind, substantially narrowed their claims from the Complaint, in responding to this summary judgment motion. Issues as to which further discovery may be needed have been well defined in the summary judgment process, and this case defined.

Rule 56 and the case law provide that summary judgment should not be granted, absent issues going to the merits that provide an appropriate basis for summary judgment at such an early state of the litigation. These are not present here. Issues such as the statute of limitations, a statutory or implied exemption from the antitrust laws, the doctrine of *res judicata*, acts purporting to constitute a course of action which are legally insufficient, or, market facts which cannot constitute a relevant market as a matter of law, which would justify summary judgment, are not present here.

Rule 56(f) of the Federal Rules of Civil Procedure provides:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit the affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

The purpose of Rule 56(f), set out in Wright, Miller & Kane, Federal Practice and Procedure: Civil 2D, Section 2740, is as follows:

The purpose of subdivision (f) is to provide an additional safeguard against an *improvident* or *premature* grant of summary judgment and the rule generally has been applied to achieve that objective. Consistent with this purpose, courts have stated . . . that it should be applied with a spirit of liberality (citations omitted). Where, as here, the knowledge to refute the facts propounded for summary judgment may be denied. *Collie v. Igoe*, 8 F.R. Serv. 56 C.41, Case 9 (D.C. New Jersey 1945). See also, *Kolton v. Halpern*, 260 F.2d 464 (2nd Cir. 1946). (Emphasis Supplied).

It has been held that the granting of summary judgment is in error when discovery is not yet completed. *Parrish v. Board of Commissioners*, 533 F.2d 942 (5th Cir. 1976), *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, 735 F.2d 653 (2nd Cir. 1984), *Sames v. Gamble*, 732 F.2d 49 (3rd Cir. 1984). The court must allow adequate discovery, and cases have found that this is particularly important when the relevant facts are exclusively in the control of the opposing party, as is often true in private antitrust cases. *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 294 (8th Cir. 1975), *cert. denied* 424 U.S. 915, 96 S.Ct. 1116 (1975), *Mossner Porsche Audi, Inc. v. Volkswagenwerk*, 397 F. Supp. 71 (D.C. Wis. 1975).

Here, where defendants brought their summary judgment motion just four months into the action, before any discovery by plaintiffs, and, where discovery thereafter was limited to five depositions of defendant, one request for production of not more than 25 requests (without the availability of a motion to compel further production),

and one set of not more than 25 interrogatories, clearly further discovery on relevant issues is appropriate if the Court does not deny summary judgment.

If the court believes that a material issues of fact have not been raised by Plaintiffs as to any claim, Plaintiffs should be allowed, in fairness, to complete the discovery required as to the claims and facts set out herein, as such discovery is delineated in the Declaration of James A. Hennefer.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Defendant's Motion for Summary Judgment must be denied on the merits, or, that the Court should allow sufficient factual discovery to be taken on issues supported by the law set out herein, so that Plaintiffs can produce the evidentiary proof required on matters the Court finds cannot be determined as a matter of law.

Dated: February 1, 1988

LAW OFFICES OF
JAMES A. HENNEFER

By: /s/ James A. Hennefer
JAMES A. HENNEFER
Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE,)	
INC., et al.,	)	NO.
Plaintiffs,	)	C 87 1686 WWS
)	
vs.)	
)	
EASTMAN KODAK COMPANY,)	
)	
Defendant.)	
)	

DECLARATIONS OF PLAINTIFFS IN OPPOSITION
 TO DEFENDANT KODAK'S
 MOTION FOR SUMMARY JUDGMENT

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DECLARATIONS

1. Paul Hernandez
2. John Damiani, Jr.
3. Bradley Welch
4. Kim Tamvacakis
5. Kenneth Kastner

6. Stephen M. Searle
7. James Anderson
8. Michael Arnold
9. Ronald N. Varing

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EASTMAN KODAK COMPANY,
Defendant.

NO.
C 87 1686 WWS
**DECLARATION
OF PAUL
HERNANDEZ
IN OPPOSITION
TO
DEFENDANT'S
MOTION FOR
SUMMARY
JUDGMENT**

1. The facts stated herein are known to me of my own personal knowledge, except as stated, and if called to testify, I could and would competently testify thereto.

2. I am presently President of Image Technical Service ("ITS"), Sacramento, California. ITS provides service and repair in the copier and micrographics industry, including service for Kodak Ektaprint copiers and Kodak micrographics reader-printers.

4. I was employed by the Eastman Kodak Company, Customer Equipment Service Division ("CESD"), as a service representative for 12 years, from 1972 to 1984. ITS was founded in 1984, and I joined the company in 1985.

5. I was trained by Kodak on the service of their micrographics equipment and the Ektaprint copier. I was fully trained and certified by Kodak's CESD in maintenance and operation of the Ektaprint photocopier. Both my technicians at ITS and I updated our knowledge of Kodak micrographics machines through manuals purchased directly from Kodak. In the copier area, both my technicians and I have been trained on updates for the Kodak Ektaprint models from recently Kodak trained technicians.

The Kodak Micrographics and Photocopy Machine Repair Market

6. The Kodak micrographics cameras, processors, reader-printers and Ektaprint copiers require special tools, parts, and manuals, with updates of manuals, in order to service them. In order to service these Kodak machines a technician must have special training, and obtaining this training requires a commitment of time and money by ITS or other independent service companies before the technician can adequately provide such

service. It takes about one year's training before a technician is fully proficient and profitable as a service representative of ITS.

7. The Kodak micrographics machines and Ektaprint copiers are specialized machines. Publications for the training required for the Ektaprint are written in Kodak International Service Language "KISL" and are available only through Kodak's Rochester offices.

8. The photocopy industry and the consumers of photocopy services consider the service of Kodak machines as distinct from other machines. The machines were specialized, requiring Kodak training, tools, parts and manuals. Owners of Kodak equipment were extremely hesitant to go to anyone but Kodak for such service even if non-Kodak service existed, which it often did not.

9. The Kodak equipment owners are reticent to change away from Kodak, and will not usually do so for a small change in price, as for example a 10% lower price. ITS was able to obtain service contracts from Kodak customers only because of Kodak's high prices and, often, the poor quality of its service.

10. The micrographics industry, and consumers of micrographics products consider the service of Kodak machines as distinct from other machines. The machines are specialized, requiring Kodak training, tools, parts and manuals. Kodak micrographics machine owners are hesitant to use non-Kodak service unless their service has been very bad or the prices very unreasonable. Kodak machine owners would not change away from Kodak

service for a small price differential, like 10%. The reduction in price would have to be in the vicinity of 20%.

11. Kodak developed its own service technicians and service representatives to service Kodak micrographics equipment and the Ektaprint photocopiers. In most areas of the United States with which I am familiar, no significant independent service organization developed. The area that can be serviced with a three hour response time on copiers would have to be within a 25 mile radius. In Los Angeles, no independent service organizations had developed for the servicing of Kodak Ektaprint copiers. None had developed in Sacramento in service contracts until approximately July 1984, and the advent of ITS. ITS is now the only independent servicing organization for the Kodak Ektaprint photocopier in this area. The only other independent service in the area is in San Jose and it services only large, high production machines such as IBM, Kodak and Xerox. There are fewer than ten in the whole United States.

12. Kodak's prices for service of Kodak micrographics equipment and Ektaprint machines are extremely high when compared to the cost of providing that service. As an example, Kodak was charging Computer Science Corporation of Sacramento \$200,000 for annual service contracts on all its micrographic machines, which ITS thereafter acquired, and gave better service on these machines, at just over \$100,000. ITS is still able to realize a profit of over \$50,000 on these contracts.

13. Kodak photocopy machines and machine service are substantially different from the service for Xerox, IBM, or other photocopy machines because of the special

training, special tools, special parts, special manuals, and special technical needs of these machines, and because of the restrictions on entry into the market, including those imposed by Kodak itself as set out herein.

14. Customers for Ektaprint photocopiers are mostly unaware that any third-party independent service organizations have arisen.

Kodak Policies Regarding Sale of Service Parts

15. In founding ITS as an independent service organization ("ISO") I was aware of the fact, and depended on the fact, that the "Terms of Sale" for parts of Kodak that CESD provides as one of its "CESD Replacement Parts Principals" includes the statement that "Kodak distributes parts throughout the world and does not rely upon dealers, agents, or distributors in the U.S. to perform this distribution function. Therefore, Kodak will sell replacement parts to any party who intends to use them to repair Kodak equipment." Said terms of sale also provides that "if, at any time, it becomes necessary to discontinue shipments to any of its customers, to revoke or modify any of these terms of sale, or to allocate distribution of any of its products, Kodak shall take whatever action in its judgment is fair and appropriate." In 1984, I specifically called Kodak Parts Services and asked whether I could buy photocopy and micrographics parts for ITS's repair services from Kodak, and was told that I could. These Terms of Sale are attached hereto as **Exhibit A**. Kodak did not change these Terms of Sale to reflect its new practice until December 2, 1985 and December 1, 1986 as set out in **Exhibit B** and **Exhibit C** hereto.

16. In 1984 and early 1985 ITS purchased from Kodak all of the parts it needed for servicing its customers' Ektaprint copiers. Kodak never at any time until July 1985 informed ITS in writing that it would not sell copier parts for service. Another ISO, Chapin Precision Industries, had also ordered and received large numbers of Ektaprint copier parts and tools for service of other parties copiers. ITS purchased from Kodak, in 1984, as independent repair service organizations had for decades, all the parts needed for repair of Kodak micrographics machines.

17. Prior to July 1985, Kodak sold replacement parts, tools, test equipment, service manuals and specifications for Ektaprint machines to ITS. In reliance upon the policy of Kodak stated to me, and these sales, and in reliance upon the Terms of Sale of CESD for the sale of parts, ITS purchased replacement parts, tools, test equipment, service manuals and specifications for the servicing of Kodak photocopying machines; it recruited, hired and continued the training of Kodak-trained personnel with expertise in the servicing of Kodak photocopy machines; it developed a customer base for the service of Kodak photocopy machines; and it bid for large government contracts, including contracts for the State of California, and four large contracts in the private sector.

Kodak's Actions To Drive ITS Out Of Business As An ISO

18. In the micrographics field, the steps which ITS has experienced Kodak taking to drive ISOs out of business are: 1) the refusal to sell parts at all for newer equipment, (so that ITS will gradually be edged out of the

market, as their customers acquire larger and larger amounts of such equipment or be terminated by customers who acquire some new equipment and will not split their service between Kodak and ITS); 2) delays in parts shipments, particularly "rush" orders, and critical parts, (so that ITS's customers' machines will be "down" for long periods); 3) the raising of prices for parts (already priced well above the cost of these parts); 4) Kodak refusing to allow, even long in advance, the ordering of enough parts for ITS to inventory; 5) Kodak pressuring OEM's not to sell parts to ITS; and, 6) Kodak telling ITS customers that ITS will not be able to get parts or will be out of business.

19. Beginning in or about July 1985, Kodak instituted a policy of refusing to sell parts directly to certain ISOs like ITS who were servicing Kodak photocopy machines or to others who supply these parts to ISOs like ITS.

20. On April 24, 1985, ITS was awarded a contract by the State of California Mental Health Department for the servicing of its Kodak Ektaprint photocopy machines. On May 17, 1985, ITS was awarded by the State of California, Department of Finance, a contract for the service of the Kodak Ektaprint photocopy machines. Both contracts were awarded through the competitive bid process. ITS and Kodak were the only bidders. The contracts were to begin July 1, 1985.

21. In or about June or July 1985, despite the prior sales to ITS, despite its "Terms of Sale", and despite sales of parts, tools, test equipment, supplies, service manuals and specifications to parties outside of the CESD service

organization, including owners of Kodak Ektaprint photocopy machines and other independent service companies not competing so directly with Kodak, Kodak first began to refuse to sell to ITS parts, tools, test equipment, supplies, service manuals and specifications for the service of Kodak Ektaprint photocopy machines.

22. On June 12, 1985 and on July 2 and July 9, 1985, a total of eight orders were placed by ITS to Kodak for replacement parts and supplies for Ektaprint photocopying machines as they had been placed and filled in the past, and control numbers were provided for such orders. Without notice to ITS these parts were never shipped by Kodak. On July 16, 1985, in response to an inquiry about orders that had not been shipped, an employee of Kodak stated that Kodak would not sell ITS replacement parts for the Ektaprint photocopying machine any more. No reason was given for this change in practice towards ITS.

23. Prior to April, 1985 ITS had been informed by Kodak that it could purchase service modules for the servicing of Ektaprint photocopying machines if it owned an Ektaprint machine no matter where it was purchased. Such service modules were required equipment for the servicing of Kodak Ektaprint photocopying machines. In reliance on that information, ITS purchased an Ektaprint 100AF photocopying machine. ITS was then told by Kodak that service modules would only be *leased* to people who owned Ektaprint copying machines, and then that Kodak would not sell or lease ITS a service module, even though ITS owned their own Ektaprint photocopying machine.

State of California Contracts of ITS, Blacklisting

24. ITS was able to procure contracts for four State of California departments to service their Ektaprint copiers. The departments were, in addition to the Mental Health Department, the Department of Transportation, Department of Health Services, and the Department of Finance. These were procured through the bid process. There were, at that time, some 53 other Ektaprint machines at the State of California which were not put out to bid but remained locked into Kodak on full price Kodak contracts because ITS, having had its parts so severely curtailed, could not go after this business.

25. ITS began to purchase Ektaprint photocopy parts, tools, test equipment, supplies, service manuals and specifications through Far West Micrographix, which owned and serviced its own Ektaprint copy machine.

26. ITS purchased micrographic parts through Visual Graphix Inc., which was a bona fide Kodak broker allowed to purchase and resell many other Kodak products. Visual Graphix has been allowed to purchase micrographics parts on an unrestricted basis because it did not compete with Kodak as an ISO. One of the written conditions for Visual Graphix to be a Kodak broker of equipment is that Kodak must install and service the machines Visual Graphix sells. Visual Graphix cannot compete with Kodak on service.

27. Far West and ITS are affiliated companies as a result of a large common shareholder and founder of those companies. In September, 1985, Kodak, knowing of

this connection of Far West and ITS, and despite continued sales of Ektaprint photocopying machine parts, tools, test equipment, supplies, service manuals and/or specifications to owners of Ektaprint photocopying machines, also refused to sell said items to Far West.

28. Replacement parts, tools, test equipment, supplies, service manuals and specifications for the Ektaprint photocopying machines, which Kodak has now refused to sell directly or indirectly to ITS, are absolutely necessary for the maintenance and repair of Kodak Ektaprint photocopying machines under the contracts with the State of California and other entities obtained by ITS in direct competition with Kodak.

29. If ITS is unable to perform on its contracts to service the Ektaprint photocopying machines with the State of California, it will be "black-listed" for State contracts, preventing it from submitting bids for a period of seven years.

30. ITS has competed directly with Kodak for State of California contracts not only in the area of Ektaprint photocopying machines, but in the service of micrographics machines as well. The yearly maintenance contract for the Department of Mental Health for 1987 was \$8,988 based upon 100,000 copies on their Ektaprint 150AF copier. The contract for the Department of Transportation was \$7,368 for the same number of copies on their 150F. Kodak's published prices for these were \$28,969 and \$26,868, respectively.

31. In 1984, prior to entering the bidding competition for the State of California contracts for service of Ektaprint photocopying machines, ITS successfully bid

against Kodak and received contracts for the servicing of micrographics equipment in ten State of California departments, including the Department of Transportation, Department of Water Resources, Department of Vital Statistics, Department of Food and Agriculture, Board of Equalization, State Controller's Office, Office of Disbursements, Department of Health Services, Treasurer's Office and Teacher Licensing.

32. The "black-listing" of ITS by the State of California would prevent it from bidding, and eliminate it as a competitor to Kodak, both in the service of Ektaprint photocopying machines and all micrographics machines not only for current contracts but into the future. Kodak, as in the past, would charge full list price for its service contracts, which list price had been reduced in State bids because of ITS's competition.

33. In addition to cutting off parts, Kodak has represented to the State of California, that it would not guarantee the seven year useful life of an Ektaprint copier, if it were serviced by anyone other than Kodak. This policy had never been set out to this date, and was promulgated by Kodak in response to ITS requesting that the State departments go out to bid on service for their Kodak Ektaprint copiers.

Effects of Kodak's Elimination of Competitors

34. The elimination of competitors of Kodak in the service of photocopy machines for the State of California, as with private business, has meant that the customers are paying substantially greater prices for their services.

35. In the San Jose area, where Chapin Precision Industries serviced Kodak Ektaprint copiers, and had 15 units on service, the price at which service was being provided to these Kodak Ektaprint owners was substantially lower than Kodak's list price. Since, as a result of Kodak's changed parts policy, Chapin went out of business, Kodak has regained those accounts, and the accounts are back at Kodak's standard published prices.

Useful Life of Copiers and Micrographic Equipment

36. With regard to the useful life of Kodak Ektaprint copiers, the useful life can be fourteen years or longer. In fact, after the Kodak Ektaprint 150 copier with a reduction feature was introduced, all copiers thereafter, including the Kodak Ektaprint 200, 225, 235, 250, 300, and 350 were based on the Ektaprint 150 concept with different "bells and whistles." A Kodak Ektaprint 350 can be made out of a 150 chassis. In fact, a majority of the parts are interchangeable among all Kodak Ektaprint copiers regardless of model or age.

37. The useful life of Kodak micrographics equipment is just as long, or longer. There are still numerous Kodak 600 series cameras which came out in the late 1960's which are still very servicable. There are a large number of Kodak 700 cameras which came out in the early 1970's which are functional and still very good cameras. The Prostar Processor ("DVR") first came out in the 1960s and is still the basic processing unit, with many of these still in the field. The Prostar II which came out around 1982 does not contain major technological

improvements or functional features from the basic Prostar. Kodak has now refused to service DVRs anymore.

38. Nevertheless, Kodak has pushed the "obsolescence" of equipment, through the refusal to service it as a method of selling new equipment.

39. For example, Kodak stated to the City of Sacramento Police Department that their Kodak Miracode system was too old and that Kodak was not going to offer service on it. The Kodak salesman named "Bernie" told me while I was still at Kodak that Kodak was not to give this account good service because he wanted to be assured he would sell it new equipment. ITS came in and offered a contract to the City of Sacramento Miracode, and, as a result, the City did not buy the new Oracle machine which Kodak was trying to push on the City, which the Oracle system would not have been an adequate system for the City. As a result of ITS's service, the City of Sacramento had time to locate an adequate system and ITS maintained its Miracode system in good working condition for one and a half years.

Kodak's Locked In Customers

40. Kodak took advantage of the fact that it had customers locked into equipment and systems before ITS competed for the service on those systems.

41. For example, the County of Sacramento Sheriff's Department has a Kodak Oracle retrieval system. While this system was not adequate for their needs from the day it was sold by Kodak to them, from a financial and operational standpoint, they were unable to trade it in on

new equipment. Financially, they have about \$100,000 invested in the Kodak Oracle System. Were they to sell these on the used market, they would be worth less than \$5,000. Operationally, they have thousands of tapes which work only on this system. The costs of converting these tapes to another machines' format would be tens of thousands of dollars.

42. An even more graphic example of a company "locked in" to Kodak equipment is Computer Science Corporation ("CSC") which is in the business of claims processing for health and dental benefits for governmental entities. They have contracts with the State of California, State of Washington, and State of Colorado to process health and dental benefits administered by the State.

43. In connection with CSC's processing of claims, they use record keeping devices which include a combination of micrographics machines and computer output hardware and software tailored to our needs.

44. Their equipment includes the following Kodak equipment: Ninety-eight IMT 150 Microimage terminals; two Prostar processors, two Starfiche reader-printers and two 750 intelligent control microfilm units.

45. The Eastman Kodak Company serviced all of their micrographics equipment up until March 1986.

46. CSC decided to move away from Kodak services because the prices being offered by ITS were much more attractive, and because ITS agreed to provide more expeditious services, including having an in-house service representative.

47. CSC, because of the combination of machines, software used, and applications for that software, and the capital invested in their machines and in the training of their employees, could not possibly switch from Kodak machines to another brand. They are totally dependent upon the Kodak machines, because the replacement of the special applications which they have prevents them, as a practical matter, and as a financial matter, from switching to any other variety of micrographics machines. The replacement of their equipment, net of the residual value of the old equipment (which is low) would exceed \$1,500,000. The cost of additional applications software could run several hundred thousand dollars, as would the reformatting of data and the training of personnel.

ITS Competition With Kodak at CSC

48. ITS competed directly with Kodak in 1986 for the maintenance contracts of CSC in Sacramento, California.

49. CSC was dissatisfied with Kodak's service because the prices were too high, and because Kodak did not give expeditious service to CSC.

50. Whereas Kodak had put a weak service representative on the CSC account and refused to allow him to be located on site (even though there were enough machines to comprise one and one-half service territories), ITS put one of its strongest technicians, Randy Ward, in that location, and agreed to station him on

CSC's premises. ITS, after extensive negotiations, undertook the maintenance of all of CSC's Kodak micrographics equipment for just over \$100,000 per annum, saving the CSC 50% on the \$200,000 per annum being charged by Kodak.

51. ITS allowed CSC to pay quarterly payments, whereas Kodak had charged them full price up-front for its \$200,000 maintenance contracts.

52. With its in-house service representative at CSC, and with extra machines at ITS which can replace any "down" machine at CSC, or from which machines assemblies can be taken out and can replace assemblies at CSC, ITS has provided more reliable and substantially more expeditious service than Kodak provided, with much less down time.

53. Our technician, Randy Ward, fixed, in a period of approximately two weeks after ITS took over the contract at CSC, three micrographics machines that had not been working for six months under the Kodak service agreements.

54. Despite ITS's contract with CSC, there has been substantial concern by CSC over the fact that on newer Kodak equipment such as the Kodak Reliant 2000 camera, which CSC is acquiring, ITS cannot obtain parts. Additionally, as a result of statements made by Kodak to CSC, CSC has become concerned about ITS's ability to continue to get replacement parts to honor its existing contracts with CSC. Paul Gilbertson of CSC reported to me that Jack Lacy and a group of "Kodakers" in Rochester, New York, at a meeting he attended, indicated he was foolish to

have ITS service because Kodak had ISOs "by the balls" on replacement parts.

Competition For Service Of Machines Independently Serviced

55. ITS provides service for number of manufacturers' micrographics equipment which manufacturers depend on independent service organizations rather than in-house service. These include Micron, Microdesign, Information Design, Alos and Fuji. The service market in these micrographics machines, with numerous independent service companies all providing service, is highly competitive on price and quality of service. Service is sold separately from the machines, and is competed for by all providers. With a large user of these machines, I have never been aware of any situation like CSC, where grossly inflated prices for service of poor quality were exacted.

56. ITS also reconditions and resells used Ektaprint copiers. Through this, I have a great deal of knowledge as to the prices of used Kodak equipment since 1984. In 1984 we purchased a 100AF Kodak Ektaprint copier which was approximately 10 years old for \$15,000. We recently purchased an upgrade of the 100AF, a 150AF Ektaprint copier, which was not as old as the 100AF. We purchased this 150AF for only \$2,500. Through our information on the market prices on which used Kodak Ektaprint copiers have been selling, we have obtained prices of hundreds of used Kodak Ektaprint copiers during the period 1984 through 1988. Since Kodak instituted its policies for tightening up parts and for making it difficult to obtain Kodak

service and reconditioning of used machines, the prices at which used Kodak Ektaprint copiers are sold, for comparable models and of comparable age, have dropped precipitously.

57. This is particularly anomalous because at the same time the volume of these machines coming on the market has decreased substantially (even though there are many more Ektaprint copiers in service). Because of the lack of value for used Ektaprint copiers, fewer and fewer owners of Kodak Ektaprint copiers are trading these in to other manufacturers (from whom we purchase machines) or selling them on the open market (where we also purchase machines). These customers are locked into these Kodak machines because of the law on dual value of the machines, unless they trade them in for new Kodak machines.

58. Kodak's trade-in schedules do not reflect the value of used Ektaprint copiers on the open market, but are many times their value. For example, a Kodak Ektaprint 150AF that sold on the open market in 1987 for \$2,500 could be traded in for another Kodak Ektaprint (depending on the model) for a price as high as \$18,000, seven times its value on the open market. This wide disparity occurred only in the past two years since Kodak's practices have cut off almost entirely the flow of replacement parts to ISOs for Ektaprint copiers, and since the inordinately restrictive policies of Kodak on Kodak service and reconditioning have taken effect.

59. Kodak, with respect to control of Ektaprint copier parts has gone well beyond just the control of direct sales to third party services. They have threatened

to terminate sales to anyone who sells parts to ITS, and have accused me of taking parts while at Kodak and buying stolen parts, which is categorically untrue.

Attempts to Purchase From Kodak's OEM's

60. ITS attempted to purchase replacement parts for both photocopy and micrographics machines from purportedly "independent" suppliers of Kodak. Acme Electronics of Cuba, New York refused to sell any parts to ITS, since it stated that its parts were "proprietary" to Kodak. Barber Coleman Company was also contacted, and refused to sell ITS parts because of its "arrangement" with Kodak. ITS tried to acquire power supplies from Sola Electric of Elk Grove, Illinois, who declined to sell parts for any Kodak machines because of the "arrangement" they had "in force" with Kodak. A letter from Barber Coleman Company refusing to sell ITS parts since the part "is proprietary to Eastman Kodak" is attached hereto as Exhibit D.

Customer's Selection of Equipment

61. From my experience at Kodak and ITS, customers, including the Instant Copy Service which I am a partner in, do not go through a life cycle cost analysis for machines before purchasing the machines.

62. In some cases, like Federal government agencies, different departments purchase micrographics and photocopy equipment from the departments who pay for the service. The Department of Defense purchases equipment for the Air Force. Yet when service is ordered from

ITS for McClellan Air Force Base micrographics and photocopy machines, the base buy and pays for that service separate from its machine purchases.

Kodak Share Of The Service Markets

63. There are fewer than ten independent service organizations servicing Kodak Ektaprint copiers in the United States. From a review of Kodak's documents produced in this case, including those of Lynn Brockmann Gleason, of the statistics in Kodak's declarations in support of their motion, of the depositions in this case, and other Kodak depositions, and from my experience as an ESR with Kodak, I would calculate that Kodak has over 95% of the service of its Ektaprint copiers.

64. From a review of Kodak's documents produced in this case, and the case of *Far West v. Kodak*, including the list of all identified BENUs (Kodak micrographics ISO competitors), the statistics in Kodak's declarations in this case and in *Far West v. Kodak*, of industry publications, and from my knowledge of the average Kodak service income of BENUs and as an ESR with Kodak, I would estimate that Kodak has over 80% of the service of its micrographics machines.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 1-24 day of January, 1988, at San Francisco, California.

/s/ Paul Hernandez
Paul Hernandez

EXHIBIT A

Effective Prior to 12/2/85

Terms Of Sale**Parts Supplied By Customer Equipment
Services Division Parts Services**

1. Prices are FOB shipping point, unless otherwise specified, and are subject to change without notice, except written bids and quotations which are firm for 60 days to Federal, State, and Local Government customers, and 30 days to regular customers.
2. Prices do not include installation.
3. Any applicable local, state, or federal taxes are not included in the prices shown but will be added separately to the invoice.
4. Terms of payment: Subject to credit department approval, Net 30 days EOM from date of invoice.

Billing period – Transactions on the 26th day of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date for each month will be the 25th, and this day will be used consistently throughout the year.
5. All items supplied by parts services are sold without return privileges except for items which are returned for warranty service consideration, damaged in transit, or shipped in error by Kodak. Other returns require prior authorization of parts services and if authorized are subject to inspection, handling and restocking charges. Requests for return must include part number, invoice number, and date of shipment.

All items should be returned, transportation prepaid by the customer, to Eastman Kodak Company, Parts Service, Adjustment Section, 800 Lee Road, Rochester, New York 14650.

6. Parts orders are subject to acceptance by CESD at parts services, Rochester, New York.
7. If, at any time, it becomes necessary to discontinue shipments to any of its customers, to revoke or modify any of these terms of sale or to allocate distribution of any of its products, Kodak shall take whatever action in its judgement is fair and appropriate.
8. Kodak Manufactures and stocks parts to meet the repair needs of its equipment owners, dealers, distributors, and service outlets which are repairing, finished products distributed by Kodak. Kodak does not manufacture replacement parts to be used as components of other manufacturers' finished products.
9. All domestic "Non-Rush" parts orders shipped and billed from Parts Services, for Rochester, qualify for a 10-percent discount except items with a price code of F, M, or T. Parts Shipments made from A-Depots or by other CESD field services do not qualify for this special discount.
10. Warranty – Items (Except lamps and supply items) supplied by parts services are warranted by Kodak to function properly for one year from Kodak's billing date or three months from the date of installation, whichever occurs first. Kodak makes no other warranties, express, implied, or of merchantability for these items.

If these items do not function properly within the warranty period, Kodak will repair them without charge. If Kodak is unable to repair them, the option of replacement will be available. These remedies are not available if the items are damaged by misuse or other circumstances beyond Kodak's control.

Repair and the option of replacement, in the event that Kodak is unable to repair the items, are Kodak's only obligations. Kodak will not be responsible for

any consequential or incidental damages resulting from the sale or use of these items, even if loss or damage is caused by the negligence or other fault of Kodak.

Part Number Suffixes

The letters shown below may appear in the "Part Number" column. Always include the letters as a suffix to such part numbers in orders and correspondence.

- AC Accessories – Training Packages for Repair of Equipment Accessories
- C Designates a Manufacturing Plant
- CA Certified Alteration
- CG Instructor's Guide
- CP CRI Course Package
- CT Criterion Test (Trainee)
- CW Designates A Manufacturing Plant
- D Kits of Parts
- DG Diagnostic Procedures (when printed separately from wiring diagrams)
- DT Diskette Training for Computer Based Training
- FN Fundamentals – provides training program for fundamentals needed to repair equipment
- HC Hard Copy (these items are produced from Fiche for Data not Normally Printed on Hard Copy)
- HE Designates a Manufacturing Plant
- I Designates a Manufacturing Plant

- K Designates a Manufacturing Plant
- KP Designates a Manufacturing Plant
- MB Modification Instructions – Type 2
- MF Microfiche Card(s)
- MN Mainframe Training Program to Repair Mainframe on a Family of Equipment
- MP Manager's Package – For Training Class use
- N Designates a Manufacturing Plant
- PK Service Publication Package (Either Fiche and/or Hard Copy Items)
- PL Service Publication Subscription Plan (same as PK but with updates for a Specified Time-Frame)
 - 001 Intercompany 1-year Renewal
 - 002 Renewal Subscription Charge for Trade Customers
 - 003 Initial Subscription Charge for Trade Customers
- RG Resource Guide – Service Publication
- RM Resource Material for CRI Training Centers
- SD Designates a Manufacturing Plant
- SG Service Guide – Cards -- Part of Service Publication
- SI Software Instructions
- SP Installation Instructions
- SW Software
- TG Theory Guide

- TM Training Module (Trainee)
- TP Training Package (Trainee)
- TX Miscellaneous Publications (in course packages), Tapes, Slides, Etc.
- WD Wiring Diagram
- XP Publications not normally stocked at parts services

CESD Replacement Parts Principles

Kodak distributes parts throughout the world and does not rely upon dealers, agents, or distributors in the U.S. to perform this distribution function. Therefore, Kodak will sell replacement parts to any party who intends to use them to repair Kodak Equipment. Orders will be accepted only from the customer to be billed.

Replacement parts stocks are maintained by Kodak at a level carefully planned to fulfill Kodak's commitments to those equipment or repair service dealers and distributors that regularly provide equipment repairs to Kodak Equipment, to users of Kodak Equipment who service their own equipment, and to customers who receive equipment service from CESD. If orders are received which would require shipment from stock that would reduce parts inventory below a stock level required to fulfill Kodak's scheduled commitments, Kodak may have to back order such orders. Parts for such back orders may not be available for shipment until a special parts order can be filled by Kodak Factories or outside vendors. The selling price of items filled through such a special parts order may differ from current part prices in effect on the

date that Kodak received the order because order quantities, date manufactured, special handling and rush requirements, and other factors may significantly influence the cost of procuring and supplying such orders.

Parts Services is responsible for administering these principles. Questions regarding orders which cannot be filled because they may not be compliance with this policy are directed to parts services. Parts services will refer to CESD management for interpretation or decision in any matters which are not covered by these principles.

CESD Exchange Parts Credit Section

Parts listed in this section may qualify for exchange credit. Customers who purchase from Kodak a replacement part listed in this section are eligible for an exchange credit if an identical part is returned to Kodak and that part has not been damaged, misused, modified, altered, or repaired by other than a Kodak authorized service representative.

Parts are subject to removal from the exchange parts credit list without notice.

The unit selling price and parts warranty apply to either new or fully reconditioned parts supplied by Kodak, at its option.

Customers are requested to return parts eligible for exchange credit to Eastman Kodak Company, parts services, 800 Lee Road, Rochester, New York 14650, and to include with such parts the following information:

Statement requesting "Exchange Credit" including date and source of replacement parts purchased; equipment model and serial number; and customer name and address returning the part.

Terms

1. Parts for exchange credit to be returned transportation repaid by customer to Eastman Kodak, company, parts services, Rochester, New York 14650.
2. Any applicable local, State, or Federal taxes will be added to the exchange credit and will be listed separately on the invoice.
3. Billing period - Transactions on the 26th day of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date of each month will be the 25th, and this date will be used consistently throughout the year.
4. All exchange part credit transactions are subject to acceptance by CESD, Rochester, New York.
5. Exchange parts credits, terms, and listings are subject to change without notice, except written bids and quotations which are firm for 30 days to regular customers and for 60 days to Federal, State, and Local Government customers.

EXHIBIT B

Effective 12/2/85

MB Modification Instructions - Type 2

MF Microfiche Card(s)

- MN Mainframe Training Program to Repair Mainframe on a Family of Equipment
- MP Manager's Package - For Training Class use
- N Designates a Manufacturing Plant
- PK Service Publication Package (Either Fiche and/or Hard Copy Items)
- PL Service Publication Subscription Plan (same as PK but with updates for a Specified Time-Frame)
- 001 Intercompany 1-year Renewal
- 002 Renewal Subscription Charge for Trade Customers
- 003 Initial Subscription Charge for Trade Customers
- RG Resource Guide - Service Publication
- RM Resource Material for CRI Training Centers
- SD Designates a Manufacturing Plant
- SG Service Guide - Cards - Part of Service Publication
- SI Software Instructions
- SP Installation Instructions
- SW Software
- TG Theory Guide
- TM Training Module (Trainee)
- TP Training Package (Trainee)
- TX Miscellaneous Publications (in course packages), Tapes, Slides, Etc.
- WD Wiring Diagram
- XP Publications not normally stocked at parts services

CESD Replacement Parts Principles

Replacement parts stocks are maintained by Kodak at a level carefully planned to fulfill Kodak's commitments to its equipment or repair service dealers and distributors that are authorized to provide repairs to Kodak equipment, to users of Kodak Equipment who service their own equipment, and to customers who receive equipment service from CESD. If orders are received which would require shipment from stock that would reduce parts inventory below a stock level required to fulfill Kodak's scheduled commitments, Kodak may have to back order such orders. Parts for such back orders may not be available for shipment until a special parts order can be filled by Kodak factories or outside vendors. The selling price of items filled through such a special parts order may differ from current part prices in effect on the date that Kodak received the order because order quantities, date manufactured, special handling and rush requirements, and other factors may significantly influence the cost of procuring and supplying such orders.

Parts services is responsible for administering these principles. Questions regarding orders which cannot be filled because they may not be compliance with this policy are directed to parts services. Parts Services will refer to CESD management for interpretation or decision in any matters which are not covered by these principles.

CESD Exchange Parts Credit Section

Parts listed in this section may qualify for exchange credit. Customers who purchase from Kodak a replacement part listed in this section are eligible for an

exchange credit if an identical part is returned to Kodak and that part has not been damaged, misused, modified, altered, or repaired by other than a Kodak authorized service representative.

Parts are subject to removal from the exchange parts credit list without notice.

The unit selling price and parts warranty apply to either new or fully reconditioned parts supplied by Kodak, at its option.

Customers are requested to return parts eligible for exchange credit to Eastman Kodak company, parts services, 800 Lee Road, Rochester, New York 14650, and to include with such parts the following information:

Statement requesting "Exchange Credit" including date and source of replacement parts purchased; equipment model and serial number; and customer name and address returning the part.

Terms

1. Parts for exchange credit to be returned transportation repaid by customer to Eastman Kodak Company, Parts Services, Rochester, New York 14650.
2. Any applicable local, State, or Federal taxes will be added to the exchange credit and will be listed separately on the invoice.
3. Billing period - Transactions on the 26th day of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date of each month will be the 25th, and this date will be used consistently throughout the year.

4. All exchange part credit transactions are subject to acceptance by CESD, Rochester, New York.
5. Exchange parts credits, terms, and listings are subject to change without notice, except written bids and quotations which are firm for 30 days to regular customers and for 60 days to Federal, State, and Local Government customers.

TERMS OF SALE

Parts Supplied By Customer Equipment Service Division Parts Service

1. Prices are FOB shipping point, unless otherwise specified, and are subject to change without notice, except written bids and quotations which are firm for 60 days to federal, state and local government customers, and 30 days to regular customers.
2. Prices do not include installation.
3. Any applicable local, state, or federal taxes are not included in the prices shown but will be added separately to the invoice.
4. Terms of payment: Subject to credit department approval, Net 30 days EOM from date of invoice.

Billing period - transactions on the 26th day of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date for each month will be the 25th, and this day will be used consistently through out the year.

5. All items supplied by parts services are sold without return privileges except for items which are returned for warranty service consideration, damaged in transit, or shipped in error by Kodak. Other returns require prior authorization of Parts Services and if authorized are subject to inspection, handling and restocking charges. Requests for return must include part number, invoice number, and date of shipment.

All items should be returned, transportation prepaid by the customer, to Eastman Kodak Company, Parts Services, adjustment section, 800 Lee Road, Rochester, New York 14650.

6. Parts orders are subject to acceptance by CESD at Parts Services, Rochester, New York.
7. If, at any time, it becomes necessary to discontinue shipments to any of its customers, to revoke or modify any of these terms of sale or to allocate distribution of any of its products, Kodak shall take whatever action in its judgement is fair and appropriate.
8. Kodak manufactures and stocks parts to meet the repair needs of its equipment owners, dealers, distributors, and service outlets which are repairing finished products distributed by Kodak. Kodak does not manufacture replacement parts to be used as components of other manufacturers' finished products.

EXHIBIT C

Effective 12/1/86

Terms of Sale

Items Supplied by Kodak Parts Services

Parts are stocked to meet the repair needs of Kodak's authorized dealers, distributors, service outlets, Kodak customer equipment services field engineers and equipment service centers, government users, and other users who purchased equipment directly from Kodak and who service only their own Kodak equipment. Kodak Parts Services does not supply replacement parts to be used as components of other manufacturers' finished products.

If, at any time, it becomes necessary to discontinue shipments to any buyer, to revoke or modify any of these terms of sale or to allocate distribution of any of our parts or products, Kodak shall take whatever action in its judgement is fair and appropriate

Parts orders are subject to acceptance by customer equipment services (CES) at Parts Services, Rochester, New York.

1. Prices: Prices are FOB shipping point, unless otherwise specified, and are subject to change without notice. Prices do not include installation.
2. Bids and quotations: Written bids and quotations are firm for 60 days to federal, state, and local government customers, and 30 days for all other authorized customers who are repairing finished products distributed by Kodak.
3. Taxes: any applicable local, State, or Federal taxes are not included in the prices shown, but will be added separately to the invoice.
4. Terms of payment: Subject to credit department approval, Net 30 days EOM from date of invoice.

Billing period - Transactions on the 26th of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date for each month will be the 25th, and this day will be used consistently throughout the year.

5. Returns: All items supplied by Parts Services are sold without return privileges except for items which are returned for warranty service consideration, damaged in transit, or shipped in error by Kodak. Other returns require prior authorization of Parts Services and if authorized are subject to inspection, handling and restocking charges. Requests for return must

include part number, invoice number, and date of shipment.

All items should be returned, transportation prepaid by the customer, to Parts Services, Adjustment section, 800 Lee Road, Rochester, New York 14650.

6. Warranty: items (Except lamps and supply items) supplied by Kodak Parts Services are warranted by Kodak to function properly for one year from Kodak's billing date or for the time periods listed below from date of installation, whichever occurs first.

Business imaging systems and copy
products parts - One Month
All other parts - Three Months

Kodak makes no other warranties, express, implied, or of merchantability for these items.

If these items do not function properly within the warranty period, Kodak will repair them without charge. If Kodak is unable to repair them, the option of replacement will be available. These remedies are not available if the items are damaged by misuse or other circumstances beyond Kodak's control.

Repair and the option of replacement, in the event that Kodak is unable to repair the items, are Kodak's only obligations. Kodak will not be responsible for any consequential or incidental damages resulting from the sale or use of these items, even if loss or damage is caused by the negligence or other fault of Kodak.

CES Replacement Parts Practices

Replacement parts stocks are maintained by Kodak at a level carefully planned to fulfill Kodak's commitments to its equipment or repair service dealers and distributors

that are authorized to provide repairs to Kodak equipment, to users of Kodak Equipment who service their own equipment, and to customers who receive equipment service from CES. If orders are received which would require shipment from stock that would reduce parts inventory below a stock level required to fulfill Kodak's scheduled commitments, Kodak may have to back order such orders. Parts for such back orders may not be available for shipment until a special parts order can be filled by Kodak Factories or outside vendors. The selling price of items filled through such a special parts order may differ from current part prices in effect on the date that Kodak received the order because order quantities, date manufactured, special handling and rush requirements, and other factors may significantly influence the cost of procuring and supplying such orders.

Parts services is responsible for administering these practices. Questions regarding orders which cannot be filled because they may not be in compliance with this policy are directed to Parts Services. Parts Services will refer to CES management for interpretation or decision in any matters which are not covered by these practices.

CES Exchange Parts Credit Section

Parts listed in this section may qualify for exchange credit. Customers who purchase from Kodak a replacement part listed in this section are eligible for an exchange credit if an identical part is returned to Kodak and that part has not been damaged, misused, modified, altered, or repaired by other than a Kodak authorized service representative.

Parts are subject to removal from the exchange parts credit list without notice.

The unit selling price and parts warranty apply to either new or fully reconditioned parts supplied by Kodak, as its option.

Customers are requested to return parts eligible for exchange credit to Eastman Kodak Company, Parts Services, 800 Lee Road, Rochester, New York 14650, and to include with such parts the following information:

Statement requesting "Exchange Credit" including date and source of replacement parts purchased; equipment model and serial number; and customer name and address returning the part.

Terms

1. Parts for exchange credit to be returned transportation prepaid by customer to Eastman Kodak Company, Parts Services, Rochester New York 14650.
2. Any applicable local, state or federal taxes will be added to the exchange credit and will be listed separately on the invoice.
3. Billing period - Transactions on the 26th day of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date of each month will be the 25th, and this date will be used consistently throughout the year.
4. All exchange part credit transactions are subject to acceptance by CES, Rochester, New York.
5. Exchange parts credits, terms, and listings are subject to change without notice, except written bids and

quotations which are firm for 30 days to regular customers and for 60 days to Federal, State, and Local government customers.

EXHIBIT D

- ☐ Colman Motor Products
- ☐ Colman AC Motors
- ☐ Colman OEM Motors

BARBER
COLMAN
COMPANY

May 28, 1987

Image Technologies
4443 Auburn Blvd.
Suite N
Sacramento, CA 95841

Attn: Paul Hernandez

Dear Mr. Hernandez:

Per our conversation on May 18, 1987 regarding our FYQM 33610-10 motor. We cannot sell that motor to your company because it is proprietary to Eastman Kodak.

Regards,

/s/ Marta Jones
Marta Jones
Sales Correspondent

MJ/tb

Jim,

For your information on proprietary parts.

Paul Hernandez

Barbar-Colman Company
Motor Division

Mailing Address
P.O. Box 2248
Loves Park, IL U.S.A.
91158-2940

Office Location
1881 Rock Street
Rockford, IL U.S.A. 61101

Phone: (813) 633-2442
ITT Telex 433337

LAW OFFICES OF JAMES A. HENNEFER
 James A. Hennefer, Esq.
 220 Sansome Street, Fourteenth Floor
 San Francisco, California 94014
 (415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL	)	NO. C 87 1686 WWS
SERVICE, INC., et al.,)	
Plaintiffs,	)	DECLARATION OF
	)	JOHN DAMIANI, JR. IN
vs.	)	OPPOSITION TO
	)	DEFENDANT'S MOTION
EASTMAN KODAK	)	FOR SUMMARY
COMPANY,	)	JUDGMENT
Defendant.)	

I, JOHN DAMIANI, JR., declare as follows:

1. The facts stated herein are known to me of my own personal knowledge except as so stated, and I could competently testify to them if called upon to testify.

Background of J-E-S-P

2. I am the General Manager of J-E-S-P Company, a company which offered microfilm equipment sales, service and supplies, primarily to Eastman Kodak micrographics equipment. As of September 1986, J-E-S-P had 129 customers for service of their Kodak micrographics equipment on a per call (time and material) basis or under yearly maintenance contracts. These 129 customers owned 1,911 pieces of Kodak micrographics equipment.

3. 51 of these 129 J-E-S-P customers have yearly maintenance contracts with J-E-S-P. In 1977, J-E-S-P earned 98% of its income from the servicing of Kodak equipment. However, because of statements by Kodak personnel, during 1984, that Kodak was planning to take action to inhibit the activities of third party service companies through parts, J-E-S-P implemented a redirected effort to support and sell equipment of other manufacturers. This effort has continued, and as of October of 1986, we had reduced our dependency on Kodak to 41% of our income.

4. The following table indicates our growth in the area of Kodak machines through 1983, and the substantial cutbacks in growth as a result of Kodak's parts policy.

J-E-S-P
 Customer Growth in Micrographics Service
 of Kodak Equipment

Year	Total Kodak Customers	New Kodak Customers	Total Kodak Machines Under J-E-S-P Service	New Kodak Machines Under J-E-S-P Service
1978	9	9	175	175
1979	12	3	222	47
1980	19	7	466	244
1981	25	6	605	139
1982	32	7	637	32
1983	41	9	717	80
1984	48	7	737	20
1985	49	1	743	6
1986	51	2	749	6

5. J-E-S-P, when first founded by me, was able to enter the service industry marketplace for Kodak machines, even though customers questioned the ability of a single technician, starting his own business, to give reasonable response time. I overcame customer concerns through the following:

A. J-E-S-P Company charged less than Kodak for service;

B. J-E-S-P Company worked longer hours and was available more than Kodak CESD technicians;

C. J-E-S-P repaired older equipment which Kodak stated it was not willing to repair and as to which Kodak attempted to sell new equipment in replacement of;

D. Customers were annoyed by Kodak's high prices; and

E. Customers were annoyed by Kodak's arrogance to the customer.

6. One account, which is an example of these elements, is the European American Bank in New York City. In 1980 the Bank looked for alternative microfilm equipment maintenance for their Kodak machines. The Bank was angry with Kodak because Kodak had pressured the Bank to update their Kodak RW600 microfilmer with new Kodak equipment. Kodak represented that in a few years the replacement parts for many of the Bank's branch office Kodak model RW600 microfilmers would not be available and no service contracts would be offered by Kodak. J-E-S-P began servicing the Kodak RW600's in

1980, and J-E-S-P is still servicing many of these European American Bank microfilmers which are giving good service to the present. European American Bank, further, has assigned the service responsibility for other Kodak equipment, used by them, to J-E-S-P.

Background Of John Damiani, Jr. in Micrographics

7. I was employed by the Eastman Kodak Company from 1951 to 1977. These 26 years of employment by Kodak as micrographics service representative for CESD gave me an extensive background in the servicing of Kodak micrographics equipment. I was also familiar with the prices and marketing Kodak employed for service contracts, since I sold these during my tenure with Kodak. I won first place in a New York Region service contract selling contest. I finally determined to leave Kodak because of a dispute over their policies on older aged employees.

The Service of Micrographics as a Separate Industry

8. During my 26 years with Kodak, Kodak had always regarded the micrographics service department as a separate branch. In 1951 when I first joined the Kodak micrographics subsidiary, Recordak Corporation, I was assigned to the New York City branch office. The sales manager of the New York City branch office was also the branch manager. The service department, on the other hand, was run by a separate service supervisor. This is still true today, where Kodak has separate district sales managers, and district service managers.

9. Kodak's emphasis in the micrographics ("BISD") area was on the marketing and sales of new equipment. Selling machines and supplies was paramount. After the sales of new machines and the sales of supplies, the service revenue took a third place in the realm of profit.

10. In the 1970's, service representatives for Kodak were repeatedly reminded that the service department was a separate, self-supporting division and was expected to produce a profit for Kodak. Kodak was run as a two-industry, complimentary-effort company; i.e., (1) selling machines and supplies, plus (2) selling service. Kodak had done well competing for machine sales against companies like Burroughs, Bell and Howell and others. Kodak also had done well in competing for the lucrative supplies/film sales against companies like 3M, Rochester Film Company and others. Kodak up until this time had no competition in the service industry for Kodak micrographics machines.

The High Prices For Kodak Micrographics Service

11. Without competition in the service industry Kodak was able to charge very high prices for its service. I made a analysis of the financial characteristics of the service territory which had been assigned to me by Kodak before I decided to go into the Kodak micrographics service industry. In doing this financial analysis I took the prices Kodak charged for service contracts and my customer list, and compiled a dollar figure for Kodak revenues from customers who had contracted for Kodak service within my territory. Kodak contract earnings were

approximately \$300,000, on machines which were my service responsibility. Taking my \$18,000 per year salary, approximately \$30,000 per year in parts and adding generous figures to cover fringe benefits, company car, tools, training and support, the resulting cost to Kodak for my servicing those contracts was under \$80,000.

12. This financial calculus convinced me that I could go into the third party service market and, provided parts were available, could compete with Kodak head-to-head in the service industry by charging less, working longer hours, repairing equipment which Kodak refused to repair, and taking advantage of customers' annoyance at Kodak's high prices and arrogance. This I did, and built the J-E-S-P Company.

J-E-S-P Training and Parts Inventory

13. J-E-S-P personnel, in addition to training received and experience derived through working with Kodak, spent substantial individual time researching, reading technical literature, attending schools that are available and speaking to technically proficient friends. At J-E-S-P, as well as with other motivated service industry technicians, learning and applying the new technologies, even without Kodak's direct assistance, has been a commitment, even though it has proved time consuming and costly.

14. In areas where Kodak, or any other micrographic company has provided quality service at a reasonable price, independent service organizations,

including J-E-S-P, have found it difficult to acquire customers. In 1982, for example, Pan American World Airways, on its own, went looking for alternative microfilm equipment maintenance service for 3M equipment which was located at Kennedy Airport in New York City. Pan Am was looking for such service because they were upset by the service they were receiving from the 3M Company. They located J-E-S-P, and we undertook to maintain their micrographic equipment, and do so to this day. The poor quality of 3M service in the New York City Region is not the case with the 3M service in New Jersey. Because of excellent 3M Company service in New Jersey, it has been extremely difficult for J-E-S-P to compete for 3M customers in New Jersey.

Kodak's Actions Against Third Party Services

15. With regard to Kodak service, J-E-S-P was able, as shown in the chart in paragraph 4, to take an increasing number of customers and machines from Kodak. J-E-S-P began hearing in the early 1980's directly from Kodak personnel, as well as from customers, that Kodak was upset with the J-E-S-P Company for taking away their service customers. We heard comments directly from Kodak sales and service personnel that Kodak was planning to do something about this new competition. These rumors increased through 1984 and consummated first in Kodak's refusal to sell new equipment parts in 1985 and then in the letter from Joseph O'Brien of July 18, 1986 announcing Kodak's new change in policy with regard to restrictions on parts for older equipment.

16. We have learned, that as a result of this new policy, J-E-S-P has been designated a BENU "Business Equipment Non-User" (which is synonymous with third party service), and that Kodak has adopted a number of policies which, experience has confirmed, are directed at killing third party service.

17. Among these policies experienced by J-E-S-P, are: (1) The delay of orders, particularly rush orders, which are crucial for J-E-S-P to service its customers and keep the machines from having "downtime"; (2) The making of parts totally unavailable to J-E-S-P, while selling the same parts to customers who are not identified as competitors of Kodak in the service area; (3) Kodak raising its already high prices to parts that it would sell to independent service dealers, by eliminating the 10% discount on non-rush orders; (4) Kodak contacting customers and attempting to prevent them from using third-party service by telling them that parts would not be available from Kodak for independent service companies and by refusing to sell parts on any basis for new machines.

18. Kodak for the entire 26 years I had been with them and up until 1986, had sold micrographics parts to meet the "needs of its equipment owners," and "to any party who intends to use them to repair Kodak equipment," according to published Terms of Sale. Prior to Kodak's policy change in 1986, J-E-S-P could normally expect delivery of non-rush orders within 14 days, and rush orders over night or within two working days. **Schedule A** attached hereto shows how this waiting period changed, almost overnight, with the wait for normal parts orders (initially stated to be up to 90 days for

some parts) moving to an average of approximately 35 days, and, more importantly, for urgently needed parts, the wait moving from two days to approximately 26 days.

19. Even more importantly, on the sale of parts critical to machines, (which are not "all time" parts manufactured on a one time basis for machines, but are parts which regularly wear out and are frequently reordered by Kodak) Kodak refused to sell such parts to independent service organizations competing with it.

20. For example, part No. 897452 represents a feed roller which is a critical and high usage part for a Model 450 microfilmer. On February 20, 1987 J-E-S-P issued Purchase Order 3873 for a quantity of four such feed rollers, part No. 897452. On March 13, 1987, Kodak sent an unsigned letter to J-E-S-P saying that these parts were no longer available to J-E-S-P. On March 31, 1987, J-E-S-P sent a letter to Kodak explaining to Kodak why such action put J-E-S-P in a precarious position and again requesting the parts. Finally, on May 29, 1987, Kodak sent J-E-S-P a certified letter allowing for J-E-S-P's resubmission of orders for these parts. The part was not received until 136 days after the order. At the same time, Kodak was selling the same equipment parts to parties who did not compete against Kodak in the service of micrographics equipment.

21. Kodak's new parts policy relies on Kodak's argument that its parts are not profitable and cannot produce a return on assets for its Parts' Services. This does not comport with the facts of which I have knowledge. For example, for equivalent parts, the N.B. Jackets Company manufactured their part No. 50445 and sold it

to the public at \$143. Kodak sold the identical part as their part No. 9004314 at \$340. ALOS's parent company manufactured and sold their part No. 23095 at \$26.80, but Kodak sold the identical part as part No. 604315 at \$77. Additionally, Kodak eliminated its 10% discount for non-rush parts, as to all "BENU's" J-E-S-P (as well as competitors). Nevertheless, since Kodak was the only source of supply for the vast majority of all the replacement parts for Kodak micrographics machines, J-E-S-P and other independent service companies had to buy these parts and paid the higher prices.

22. Kodak represented to me in May 1985 and in the months following that they would be taking steps to discontinue supplying parts to J-E-S-P for newer equipment, and for older equipment so as to promote their sales of new equipment, and prevent J-E-S-P's lower price/higher quality service from showing up Kodak. Randy Miller, the New York Sales Manager, telephoned me on May 3, 1985 and said that Kodak would discontinue supplying parts to J-E-S-P for newer equipment and would supply parts for older equipment until the stock was depleted. He told me on June 7, 1985 that J-E-S-P was making it difficult for Kodak to sell new equipment.

23. Contracts, both public and private, which J-E-S-P had acquired for the servicing of Kodak machines were endangered or lost from the Kodak parts policies. J-E-S-P had contracts with the State of New Jersey Purchasing Department. On July 30, 1987, Mr. Vallentine of the State of New Jersey Purchasing Department told me that failure to perform on State contracts could result in: (1) suspension of J-E-S-P from the bidder's list and prevention of J-E-S-P from being awarded State contracts for

a period of time to be decided by the Director of Purchases; (2) a decision by the State to have the remainder of J-E-S-P's contract assigned to another vendor with the costs billed to J-E-S-P; (3) exclusion of bidding privileges to J-E-S-P with certain county and city governments; and/or, (4) the payment of legal fees by J-E-S-P for legal work resulting from the non-performance.

24. Because of the Kodak parts problem J-E-S-P drastically diminished its solicitation of service contracts covering Kodak equipment owned by the State of New Jersey, as well as Kodak equipment owned by county and municipal governments who take advantage of the State of New Jersey's "Bidder's List" contracts.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 26th day of January, 1988, at East Brunswick, New Jersey.

/s/ John Damiani Jr.
John Damiani Jr.

EXHIBIT A

JESP

... the source for micrographics
microfilm equipment sales, service & supplies

Kodak responses to our parts purchases as of 7/20/87

JESP PO #	Date Ordered	Date Rec'd	*Waiting Period	Urgency Request
3084	08/28/86	09/08/86	11 days	RUSH
3115	09/10/86	10/15/86	35 days	Normal
3144	09/22/86	10/15/86	23 days	Normal
3171	09/02/86	09/25/86	23 days	RUSH
3106	09/09/86	10/14/86	35 days	RUSH
3095	09/04/86	10/15/86	41 days	Normal
3294	09/16/86	10/15/86	29 days	Normal
3163	09/22/86	10/15/86	23 days	Normal
3353	10/27/86	11/05/86	9 days	Normal
3459	11/19/86	12/10/86	21 days	Normal
3537	12/04/86	12/15/86	11 days	RUSH
3657	01/07/87	02/09/87	33 days	Normal
3557	12/11/86	01/13/87	33 days	RUSH
3684	01/13/87	01/19/87	6 days	RUSH
3751	01/28/87	02/12/87	15 days	RUSH
3782	02/04/87	02/26/87	22 days	Normal
3813	02/10/87	03/17/87	35 days	Normal
3814	02/10/87	03/17/87	35 days	Normal
3815	02/10/87	03/20/87	38 days	Normal
3843	02/13/87	03/17/87	32 days	RUSH
3861	02/24/87	never rec'd		Normal
3873	02/20/87	07/06/87	136 days	Normal
3968	03/12/87	03/25/87	13 days	Normal
3989	03/18/87	04/10/87	23 days	Normal

JESP PO #	Date Ordered	Date Rec'd	*Waiting Period	Urgency Request
4048	03/26/87	04/22/87	27 days	Normal
4051	03/27/87	04/20/87	24 days	Normal
4129	04/08/87	05/18/87	40 days	Normal
4152	04/10/87	05/14/87	34 days	RUSH
4179	04/15/87	05/14/87	29 days	Normal
4005	03/23/87	04/16/87	24 days	Normal
4371	05/01/87	05/14/87	13 days	Normal
4340	04/27/87	05/21/87	25 days	RUSH
4494	05/20/87	06/17/87	28 days	Normal
4626	06/09/87	07/06/87	27 days	Normal
4628	06/10/87	07/06/87	26 days	Normal
4503	05/20/87	06/16/87	27 days	Normal
4675	06/16/87	07/07/87	21 days	Normal
4681	06/17/87	07/06/87	19 days	Normal
4777	06/29/87	07/21/87	22 days	RUSH

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL	)	NO. C 87 1686 WWS
SERVICE, INC., et al.,)	
Plaintiffs,	)	DECLARATION OF
	)	BRADLEY WELCH IN
vs.	)	OPPOSITION TO
EASTMAN KODAK	)	DEFENDANT'S MOTION
COMPANY,	)	FOR SUMMARY
Defendant.	)	JUDGMENT

I, BRADLEY WELCH, declare as follows:

1. The facts stated herein are known to me of my own personal knowledge except as stated, and, if called upon to testify to these facts, I could and would competently testify to them.

Background

2. I was President of B.C.S. Technical Services, Inc., a Colorado corporation. B.C.S. Technical Services provided leasing and servicing of microfilming equipment. Our technicians have over 19 years combined experience and specialize in the service of Kodak's Recordak, Reliant and other microfilm systems. We serviced the area in and around Denver, Colorado. I was formerly with CESD of

the Eastman Kodak Company as a Technical Resource Person. I was with Kodak from 1974 to 1986.

3. B.C.S., Inc. was the parent company of B.C.S. Technical Services, and also of B.C.S. Micrographics in Boston, Massachusetts. B.C.S. was started in January, 1986.

4. B.C.S., Inc. is owned by Vernon Hall. B.C.S., Inc. is one of the largest distributors of Kodak products in the United States. B.C.S., Inc. is a well-established broker and Kodak authorized processing lab.

Kodak Conspires To Put B.C.S. Out of Business

5. On May 26, 1987, Vernon Hall, owner of B.C.S., Inc. informed me that B.C.S., Inc. would have to dissolve B.C.S. Technical Services, because Kodak was enforcing a new policy which prohibited the independent service of Kodak micrographics equipment. He stated that he had been informed by Kodak that they did not want B.C.S. Technical Services, Inc. continuing the service of Kodak equipment. Because B.C.S., Inc. cannot afford to lose its status as a distributor of Kodak products, B.C.S. Technical Services had to be disbanded in 1987.

The Effect of Kodak's Parts Policy on B.C.S.

6. Up until the time that B.C.S. received the July 18, 1986 letter from Joseph O'Brien stating Kodak's new policy on micrographics parts, B.C.S. Technical Services had expanded rapidly its service of Kodak equipment.

7. When B.C.S. Technical Services was first founded, we made it clear to Kodak that we intended to go into the

third-party service business. We set up an account with Kodak for the resale of all items on a "non-taxable" basis. All parts were available at that time, on all Kodak micrographics equipment that we were maintaining.

8. Kodak's new policy in 1986 of refusing to sell parts at all to new equipment, and refusing to sell "all time" parts, as well as its delay in shipping parts caused our business substantial losses in customers and revenues; prevented us from expanding our business to offer a lower price, higher quality service to dozens of new customers that expressed an interest, but whom we could not service because of the parts restrictions. It prevented us from entering into the business of serving Kodak photocopy machines, since parts for these were totally unavailable from Kodak.

9. Kodak, in the past, applied a 10% discount on non-rush orders of micrographic parts. After the July 18, 1986 letter, and the September 1, 1986 deadline, this information, concerning the 10% discount, still appeared on the invoice, but was not available to B.C.S. Technical Services, as an independent service organization competing with Kodak. B.C.S. Technical Services would have been willing, and have expressed a willingness to pay to Kodak higher prices for parts if the parts were available on the same basis to all customers of Kodak. Kodak, however, told me directly that marketing motives, and not the price, profit, and return on parts, is the basis for their new policy.

10. After the July 18, 1986 O'Brien letter and the September 1, 1986 deadline, B.C.S., Inc. and B.C.S. Technical Services in Denver, because they were engaged in the

repair business, experienced substantial delays in their parts deliveries. However, B.C.S. Micrographics in Boston, which was solely a service bureau received parts immediately, since they were not identified as being in competition with Kodak in the repair business.

11. The restrictions on parts have taken on a number of forms. Some parts that were available in 1986 are no longer available at all to us as an independent service organization, but are available to other organizations such as B.C.S. Micrographics who are not engaged or identified as third-party service organizations.

12. On one parts order in 1986, Kodak delayed 30 days before letting B.C.S. Technical Services know that they would not send the part. This was a part that we had received freely in the past. Kodak's response to our inquiry as to the reason it would not ship this part to us was "this part has been ordered from our suppliers on a "all time" order basis. It is available only to Kodak personnel and customers who have purchased equipment directly from Kodak and who do their own service." This statement was clearly not true. I thereafter requested a customer of ours who bought used Kodak micrographics equipment to order the part. It was received by them in three days. This customer does not own, and did not purchase from Kodak the piece of equipment for which the part was ordered.

13. After Kodak changed their parts policy, I had a conversation with Kodak's Denver District Sales Manager, Jack Murray. Mr. Murray stated that Kodak had changed their parts policy in order to prevent used

equipment dealers from being able to repair and recondition used Kodak equipment. Mr. Murray stated that "if Kodak can prevent used equipment from being available, then customers would have to buy new equipment."

Kodak's Misrepresentations to B.C.S. Customers

14. In January, 1987, Mr. Murray told the Adams County Treasurer, William Sokol, that he should not turn his equipment maintenance over to B.C.S. Technical Services because we could not get parts from Kodak. Mr. Murray did not mention parts delays, but simply said that we could not get parts at all. B.C.S. Technical Services was willing to provide the micrographics repair services to Adams County, at a substantially discounted rate from that being offered by Kodak, and, to provide a higher quality service than that which Adams County had described it was experiencing from Kodak at the time.

15. On April 20, 1987 at 2:30 p.m., a Kodak sales representative, Thomas R. Hankens, told purchasing agent Lynette M. Maliespard of First Interstate Bank that they should not do business with B.C.S. Technical Services, because we could not get parts from Kodak, and that all parts we used to repair our equipment would be *used* parts.

16. Additionally, Kodak representatives have told Becky Martin of Super Valu Stores, Dennis Baumfalk of Bank Western, and Elizabeth Martin of Capital Life Insurance that B.C.S. could not obtain the parts necessary to service their equipment, and that they should not give their business to us.

Customers Locked In To Kodak

17. A number of accounts with which I am familiar have large investments in Kodak micrographics machines which are used in combination with computer output hardware and software specially tailored to their Kodak equipment. These include Metropolitan Life Insurance, American Express, Blue Cross/Blue Shield, Diners Club, Mountain Bell and United Bank of Denver.

18. Because of the large cost of the equipment and its low resale value, the specialization in the software, the investment in time and money in the training of their employees, these companies cannot, as a practical matter, and have not replaced their Kodak equipment with another brand even though Kodak has a monopoly on the service of this equipment since they refuse to sell parts to service this equipment to independent service organizations.

19. B.C.S. Technical Services has maintained and does maintain a large inventory of new parts from Kodak, and spends considerable sums every month to replenish this stock. All of our inventory was purchased directly from Kodak, and does not contain any used parts. B.C.S.'s substantial inventory of Kodak equipment and parts were used to film our own work, and the work of others as a microfilm service bureau. In fact, B.C.S. stocked micrographics equipment parts which represents about 15% of its total service revenues, and it takes B.C.S. almost three years to completely turn over its parts inventory. From my experience at Kodak, Kodak is able to "turn" their parts stock six times per year.

20. Through my experience at Kodak it was clear that Kodak regarded its parts sales in micrographics area as a highly profitable enterprise. A Kodak Equipment Service Representative was charged only 50% of the price that the same part was sold to an independent service company. With the elimination of the 10% discount to independent service companies, Kodak now gets 220% of the price charged to ESR when a part is sold to an independent service company.

Attempts to Purchase Parts From Kodak Suppliers

21. We have attempted on numerous occasions to buy parts from Kodak's manufacturers who supply them with replacement parts. We have been told directly by these manufacturers, such as Merkle Motor Company, and Bodine Electric Company, that they are not allowed to do business with us under the terms of their supply agreements with Kodak, or that they simply would refuse to sell Kodak parts to us based on their arrangement with Kodak.

22. B.C.S. Technical Services lost many private contracts above, a large federal government contract, and other private industry contracts as a result of the unavailability of parts, and parts restrictions.

Quality of Service and Price Competition

23. One of the primary reasons I began B.C.S. Technical Services was Kodak's policy of delaying service to Kodak micrographics owners who did not purchase a Kodak EMA. Customers of Kodak service on a "per call"

basis has an approximately three-day wait for Kodak service. Kodak management instructed its service personnel that they were to delay service and give lowest priority to such service because it was not as profitable for Kodak as their highly profitable EMA business.

24. B.C.S. offered both contact service and a 3-hour response time on per call customers for Kodak micrographics machines. This quality service response was the reason B.C.S. was able to obtain many customers from Kodak.

25. B.C.S.'s prices on service contracts were 20% lower than those of Kodak, and 35% less than Kodak on per call rates. This also was a substantial factor in B.C.S. taking business away from Kodak.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 28th day of January, 1988, at Denver, Colorado.

/s/ Bradley Welch
Bradley Welch
